Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States
October Term 1997

Arizonans for Official English and Robert D. Park,
Petitioners

v.

State of Arizona; Jane Dee Hull, Governor of Arizona; Grant Woods, Attorney General of Arizona; Armando Ruiz; Linda Aguirre; John Philip Evans; Rosie Garcia; Candido Mercado; Manuel Pena, Jr.; Peter Rios, Jr.; Macario Saldate IV; Federico Sanchez; and Victor Soltero
Respondents

On Petition for A Writ of Certiorari to the Supreme Court of the State of Arizona

PETITION
for Writ of Certiorari

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July 23, 1998

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QUESTION PRESENTED

Article XXVIII of the Arizona Constitution declares English the official language of Arizona and requires all governmental actions to be taken in English. In *Arizonans for Official English v. Arizona*, No. 95-974, this Court vacated an opinion of the U.S. Court of Appeals for the Ninth Circuit, in part because of a related challenge to Article XXVIII in the Arizona Supreme Court. That state case has now concluded with a decision, based on the vacated federal opinion, striking down Article XXVIII as violating the First and Fourteenth Amendments to the Constitution of the United States.

Whether a State may require government employees to use its official language in governmental actions without offending their rights under the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Rule 14.1 Listing

All parties in the proceeding below are listed in the caption.

Rule 29.1 Statement

Arizonans for Official English is an unincorporated association and has no parents or subsidiaries.

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Petitioners, Arizonans for Official English and Robert D. Park, pray that a writ of certiorari be granted to review the judgment of the Supreme Court of the State of Arizona, *en banc*, in *Ruiz v. Hull*, entered on April 28, 1998.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Arizona in *Ruiz v. Hull* is printed in the Appendix hereto ("App."), 1a, *infra*, and is to be reported at __ P.2d ___ (Ariz. 1998). The opinion of the Arizona Court of Appeals, Division One, is printed in the Appendix hereto, App. 49a, and is reported at 1996 WL 309512, 218 Ariz. Adv. Rep. 9 (App. 1996). The unreported opinion of the Superior Court of Maricopa County, No. CV 92-19603 (Cates, J.) is printed in the Appendix hereto, App. 59a.

This Court's earlier decision in *Arizonans for Official English v. Arizona*, No. 95-974, 517 U.S. __, 117 S.Ct. 1055 (1997), vacated and remanded a decision of the Ninth Circuit, reported at *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), *vacated on remand*, 118 F.3d 667 (9th Cir. 1997). The Arizona Court of Appeals, in the interests of comity, adopted the Ninth Circuit opinion in *Yniguez*. App. 58a. The Arizona Supreme Court also accepted the reasoning of the vacated Ninth Circuit opinion. App. 7a, n.1.

JURISDICTION

The judgment of the Supreme Court of the State of Arizona, declaring Article XXVIII of the Arizona Constitution unconstitutional under the First and Fourteenth Amendments to the United States Constitution, was entered on April 28, 1998. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article XXVIII of the Arizona Constitution:

ARTICLE XXVIII. ENGLISH AS THE OFFICIAL LANGUAGE

1. English as the official language; applicability

Section 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3) (a) This Article applies to: (i) the legislative, executive and judicial branches of government; (ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities; (iii) all statutes, ordinances, rules, orders, programs and policies; (iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase, "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

2. Requiring this state to preserve, protect and enhance English

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.

3. Prohibiting this state from using or requiring the use of languages other than English; exceptions

Section 3. (1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and in no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances: (a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

(c) to teach a student a foreign language as part of a required or voluntary educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

4. Enforcement; standing

Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

U.S. Constitution, Amendment I (in part):

Congress shall make no law . . . abridging the freedom of speech . . .; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment XIV, Section I (in part):

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a "government speech" case (though the decision below does not mention government's own speech rights), asking whether a State may require that its own speech be in its official language. This case thus asks whether a State's right to "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message," *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995), is limited by the speech rights of government employees under *United States v. National Treasury Employees Union* ("*NTEU*"), 513 U.S. 454 (1995) and other cases.

Much of the background of this case can be found in earlier proceedings on this matter. *Arizonans for Official English v. Arizona*, 517 U.S. __, 117 S.Ct. 1055, 1060-67 (1997), *vacating*, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995)(en banc).

Article XXVIII of the Arizona Constitution:

Article XXVIII of the Arizona Constitution ("Art. XXVIII") provides that English is the official language of Arizona and that most government actions shall be taken in English. Art. XXVIII, §§ 1(1), 3(1)(a). Art. XXVIII applies, *inter alia*, to "the legislative, executive and judicial branches of government," *id.*, § 1(3)(a)(i), and "all government officials and employees during the performance of government business." *Id.*, § 1(3)(a)(iv).

Under Art. XXVIII, the State "shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona." *Id.*, § 2. The State shall "act in English and in no other language", *id.*, § 3(1)(a), and may not require the use of a language other than English." *Id.*, § 3(1)(b). No governmental document is

effective unless it is in English. *Id.*, § 3(1)(c). There are exceptions to teach English and foreign languages, to comply with federal law, to protect public health or safety, and to protect the rights of criminal defendants or victims of crime. *Id.*, § 3(2).

A person who resides in or does business in Arizona has standing to bring suit[1] to enforce Art. XXVIII. *Id.*, § 4.

Art. XXVIII was adopted by initiative in 1988. Petitioner Arizonans for Official English ("AOE")[2] was the official proponent of the initiative and many of the plaintiffs below were opponents of the initiative.

Then-Arizona Attorney General Robert Corbin, after consultation with AOE, issued an opinion construing Art. XXVIII as applying only to "official acts of government." Ariz. Att'y Gen. Op. I89-009 (1989), at 5-6. *See, e.g., Kerby v. State ex rel. Frohmiller*, 62 Ariz. 294, 310-11, 157 P.2d 698, 705-06 (Ariz. 1945)("official acts" are "acts by an officer in his official capacity under color and by virtue of his office."). The Attorney General's opinion found that Art. XXVIII was constitutional as so interpreted.

How the Federal Questions Were Raised:

In 1992, several elected officials and government employees challenged Art. XXVIII as violating their own free speech rights and those of claimants for government services.

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[1]Besides this case and *Yniguez*, only one other suit has involved Art. XXVIII; in *Robles v. Mofford*, No. 261837 (Sup. Ct. Pima County), Nov. 14, 1989, Judge Hannah dismissed a First and Fourteenth Amendment challenge to Art. XXVIII filed by a litigant who wanted to file legal papers in Spanish. Both AOE and the State were involved in *Robles*.

[2]"AOE" as used throughout also includes Park.

The action was brought under 42 U.S.C. § 1983 and the Arizona Declaratory Judgment Act, A.R.S. § 12-1831. First Amended Complaint, ¶ 1. The plaintiffs alleged that Art. XXVIII violated their rights under the First, Ninth and Fourteenth Amendments to the Constitution of the United States. *Id.*; App. 59a.

The Superior Court of Maricopa County, on cross-motions for summary judgment, found that Art. XXVIII:

did not violate the First Amendment because it was "content neutral" and did not reach constitutionally protected conduct, App. 60a;

did not violate the Ninth Amendment because "the right to communicate in the language of choice does not fall within the rights protected by the Ninth Amendment", App. 61a; and

did not violate the Equal Protection Clause of the Fourteenth Amendment because there was nothing in the record to show a discriminatory intent or purpose. App. 61a.

The Arizona Court of Appeals, Division One, reversed in part and affirmed in part. App. 51a. The Arizona Court of Appeals, in the interests of comity, adopted the opinion of the U.S. Court of Appeals for the Ninth Circuit in *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), *vacated*, 517 U.S. __, 117 S.Ct. 1055 (1997), *vacated on remand*, 118 F.3d 667 (9th Cir. 1997). App. 58a. In the vacated *Yniguez* opinion, the Ninth Circuit found that Art. XXVIII violated the First Amendment speech rights of government employees who wished to use a language other than English in their official duties. The Arizona Court of Appeals did not reach the Ninth or Fourteenth Amendment issues.

The Supreme Court of Arizona, also following the

reasoning of the Ninth Circuit's recently-vacated *Yniguez* decision, held that Art. XXVIII violated the First and Fourteenth Amendments to the U.S. Constitution. App. 6a-7a, ¶ 2. No Ninth Amendment issue was presented at this level. App. 12a, n. 4.

The Federal Challenge to Art. XXVIII:

The complex history of the federal challenge to Art. XXVIII is recounted in this Court's earlier decision. *Arizonans for Official English v. Arizona*, 517 U.S. __-__, 117 S.Ct. at 1060 - 67. To summarize: two days after the initiative passed, a state worker, Maria-Kelly Yniguez, sued for the right to execute her government documents in a language other than English. Yniguez evaluated medical malpractice claims against state hospitals, and had the authority to issue settlements of up to $10,000; her supervisor and auditors could not read or speak Spanish.

The U.S. District Court for the District of Arizona struck down Art. XXVIII, finding that it was facially overbroad, that the violation of the First Amendment was substantial, and that there were no conceivable limiting interpretations of Art. XXVIII which would uphold its constitutionality. *Yniguez v. Mofford*, 730 F. Supp. 309, 313-14, 317 (D. Ariz. 1990).

After interim decisions on intervention and mootness, 939 F.2d 727 (9th Cir. 1991), 975 F.2d 646 (9th Cir. 1992), the Ninth Circuit, *en banc*, agreed by a 6-5 vote that Art. XXVIII was unconstitutional. 69 F.3d 920 (9th Cir. 1995). The majority opinion was by Judge Reinhardt, concurrence by Judge Brunetti, and dissents by Judges Fernandez, Kozinski and Wallace.

Judge Reinhardt's majority opinion found that Art. XXVIII supported no state interests and interfered with the ability of the non-English-speaking populace of Arizona to

"receive information and ideas," 69 F.3d at 941, which are "unquestionably of public import" because they "pertain[] to the provision of governmental services and information." 69 F.3d at 940. The majority opinion dealt with the dissents' government speech analyses in a footnote, calling them "simply irrelevant here" because the majority thought government speech rights dealt only with "power to regulate government-subsidized speech of private parties." 69 F.3d at 940, n. 24.

Judge Fernandez wrote the principal dissent, concluding that Art. XXVIII did not violate the First Amendment. Citing *Rosenberger*, Judge Fernandez wrote: "the State has the right to control what it is paying for; it can control what is said by those acting on its behalf." 69 F.3d at 957. Judge Fernandez also found no protection for choice of language either as a mode of expression or for its content. 69 F.3d at 956-58. "The language does not, in the sense used here, change the content at all." 69 F.3d at 956. Judge Fernandez would have reaffirmed *Guadalupe Org. Inc., v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978), which said that governmental choice of language was a political decision.

Judge Kozinski also dissented separately, finding that the majority would create a new right for government employees to "force their employer into federal court and make it prove, to the exacting standard of the First Amendment, that its interest in enforcing its laws outweighs their right not to make statements they find objectionable." 69 F.3d at 960.

This Court unanimously vacated the Ninth Circuit opinion, finding that there was no case or controversy because Yniguez had left government employment before the appeal matured. 517 U.S. __, __; 117 S.Ct. 1055, 1069 (1997). This Court's opinion referenced the case at hand, noting that after the Arizona Supreme Court had completed its review, the

federal constitutional issues might be greatly simplified. 517 U.S. at ___; 117 S.Ct. at 1075.

The State Court Challenge to Art. XXVIII:

Superior Court for Maricopa County:

Following the Ninth Circuit's mootness decision in *Yniguez*,[3] the plaintiffs brought this action in the Superior Court for Maricopa County. App. 11a, ¶ 11. Plaintiffs included several elected officials and government employees, all of whom claimed to communicate in Spanish during the performance of government business. *Id.* The plaintiffs sought a declaratory judgment that Art. XXVIII violates the First, Ninth, and Fourteenth Amendments to the U.S. Constitution. *Id.*

AOE intervened without opposition as defendants and, in the words of the Arizona Court of Appeals, became the "primary defending litigant." App. 55a (Ct. App.).

Judge Cates considered the case under cross-motions for summary judgment. App. 11a, ¶ 12, App. 61a. The parties filed statements of facts, most of which were admitted. *See,* Plaintiffs' Statement of Facts in Opposition to Intervening Defendants' Statement of Facts and In Support of Plaintiffs' Cross-Motion for Summary Judgment, ¶ 2. Admitted facts included Nos. 10 ("No plaintiff has knowledge of any person

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[3]Plaintiffs' counsel had been counsel to Ms. Yniguez in her federal action, and many plaintiffs were members of Arizonans Against Constitutional Tampering, which intervened on appeal in *Yniguez*. Counsel filed this case in 1992 "in the event the federal action [*Yniguez*] is overthrown on the grounds of mootness." "Clarification," *Maricopa Lawyer*, April 1995, P. 4, col. 1. Plaintiffs' counsel incorporated their *Arizonans for Official English* brief in this Court as their "Brief in Chief" in the proceeding below. Respondents' Supplemental Memorandum in Support of the Judgement of the Court of Appeals, P. 2, n. 1.

being sued for violation of [Art. XXVIII]."), 11 ("Plaintiffs did not change any personal action or conduct because of [Art. XXVIII]."), and 13 ("Most plaintiffs approved of English as the language of Government."). *Id.* None of the plaintiffs have had Art. XXVIII enforced against them. App., 45a, ¶ 74 (Martone, J., specially concurring).

After briefing and oral argument, Judge Cates ruled that Art. XXVIII was constitutional, finding it did not violate the First Amendment because it was content neutral and did not reach constitutionally-protected speech, App. 60a; it did not violate the Ninth Amendment because choice of language during the performance of governmental duties is not protected by that Amendment, App. 61a; and did not violate the Equal Protection Clause of the Fourteenth Amendment because the record contained no evidence of a discriminatory intent or purpose. App. 61a.

Arizona Court of Appeals, Division One:

On appeal, the Arizona Court of Appeals, Division One, reversed Judge Cates's constitutional holding. App. 51a. The Arizona Court of Appeals did not analyze the constitutionality of Art. XXVIII. Instead the court cited the principle of judicial comity and held that "it is appropriate for us to exercise our discretion and defer to the federal litigation [*Yniguez*] and thereby accept the construction of [Art. XXVIII] and the analysis that was set forth by the Ninth Circuit." App. 58a.

The Arizona Court of Appeals explained its deferral:

> Such deference promotes uniformity in interpretation of the law and discourages the parties from forum shopping. Further, the United States Supreme Court may choose to address the constitutionality of Article 28 and put both *Yniquez*

and the instant case to rest.
App. 58a.

Supreme Court of Arizona:

The Arizona Supreme Court stayed all proceedings while this Court was considering the *Yniguez* decision in *Arizonans for Official English v. Arizona*, No. 95-974. App. 12a, ¶ 13. After this Court vacated and remanded the Ninth Circuit opinion, 517 U.S. at __, 117 S.Ct. at 1075, the Arizona Supreme Court received further briefing and argument. App. 13a, ¶ 15.

AOE and the State argued that Art. XXVIII was constitutional as "government speech," State Defendants' Supplemental Brief ("State Supp. Br."), 11-13; Intervener-Defendants' Brief on Petition for Review ("AOE's Br."), 5-6, that the First Amendment did not protect choice of language by government employees on the job, State Supp. Br. 13; AOE Br. 6-7, that government's interest in requiring use of its official language is compelling, AOE Br. 7-8, and that any unconstitutionality in Art. XXVIII was curable by accepting the Arizona Attorney General's interpretation of Art. XXVIII as applying only to official government speech. AOE Br. 9-11. The plaintiffs argued that Art. XXVIII is a content-based prohibition against all elected officials and government employees using any language other than English in the performance of government business. App. 14a, ¶ 19.

At oral argument, the plaintiffs said that they would agree that Art. XXVIII was constitutional if it applied only to official government business; AOE and the State said that Art. XXVIII would be unconstitutional if it applied to more than government speech, such as private conversations. App.

45a, ¶ 75 (Martone, J, specially concurring).[4]

On April 28, 1998, the Arizona Supreme Court held that Art. XXVIII violated the First and Fourteenth Amendments to the U.S. Constitution. App. 6a-7a, ¶ 2.

> We hold that the Amendment violates the First Amendment to the United States Constitution because it adversely impacts the constitutional rights of non-English-speaking persons with regard to their obtaining access to their government and limits the political speech of elected officials and public employees. We also hold that the Amendment violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it unduly burdens core First Amendment rights of a specific class without materially advancing a legitimate state interest.

Id.

The Arizona Supreme Court first noted: "the importance of establishing common bonds and a common language between citizens is clear." App. 14a-15a, ¶ 20, *citing, inter alia, Guadalupe Organization*, 587 F.2d at 1027 (no constitutional mandate for multilingual education or curriculum). The court noted that the Arizona Enabling Act and Constitution require that schools be conducted in English and that state officers and legislators be able to speak, read,

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[4]Justice Martone claimed that the "plaintiffs argu[ed] that [Art. XXVIII] is unconstitutional because of its breadth, but no one argu[ed] that it is constitutional notwithstanding its breadth." App. 45a, ¶ 75. Both AOE and the State did so at oral argument and in their briefs. *See, e.g.*, State Supp. Br., 3, 11-13; AOE's Br. 5-15. This misunderstanding by Justice Martone may stem from a failure to consider the "government speech" analysis which underlies much of AOE's position. *See, infra.*

write and understand English well enough to conduct office duties without an interpreter. App. 14a-15a, ¶ 20. Federal law requires English skills for naturalization and immigration benefits. *Id.* Arizona law requires that pupils should be taught English well enough to attend classes held in English. App. 15a, ¶ 20.

The court also did "not imply that the intent of those urging passage of the Amendment or of those who voted for it stemmed from linguistic chauvinism or from any other repressive or discriminatory intent."[5] App. 16a, ¶ 23.

The court, however, stated that "the American tradition of tolerance 'recognizes a critical difference between encouraging the use of English and repressing the use of other languages.'" App. 16a, ¶ 22, *citing Yniguez*, 69 F.3d at 923. The court found that Art. XXVIII could violate the First Amendment rights of "many thousands of persons who would be precluded from receiving essential information from government employees and elected officials in Arizona's government." *Id.*

The court below rejected the Attorney General's narrowing construction, finding that it did not comport with the plain wording or the intent of the Amendment, and that the opinion suffered from both ambiguity and implausibility. App. 19a, ¶ 29.

The court then contrasted Art. XXVIII with official English declarations of other States, finding "Arizona's is

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[5] ***But see,*** **Supreme Court of Arizona, Council on Judicial Administration, "Resolution in Opposition to An 'English Only' Initiative," Resolution No. 87-1, November 3, 1987 ("WHEREAS a constitutional initiative sponsored by Arizonans for Official English is now being circulated. . . [T]he Council on Judicial Administration hereby opposes the 'English Only' initiative").**

unique" and divining little guidance from other courts. App. 24a-25a, ¶ 39. For example, the court said that California's official English law, Cal. Const. Art. III, § 6, "is specific and lengthy, [but] it does not prohibit the use of languages other than English."[6] App. 27a, ¶ 43.

The court noted that if Art. XXVIII "were merely symbolic or contained some of the express exceptions of the official English provisions discussed above, it might well have passed constitutional muster." *Id.* The court felt, however, that Art. XXVIII "is too broad," reaching teachers' conversations with parents, town hall discussions with constituents, and claimants seeking unemployment or workers' compensation benefits. App. 29a, ¶ 45.

The court held that Art. XXVIII inhibits free speech in two ways: by depriving limited and non-English-speaking persons of access to information about the government, App. 31a, ¶ 49, and by depriving government employees and officials of the ability to communicate with their constituents and the public. App. 32a, ¶ 51. The first deprivation, the court said, violates the claimants' "constitutional right to participate in and have access to government, a right which is one of the fundamental principle[s] of representative government in this country." App. 31a-32a, ¶ 50. The second

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[6]The court's belief does not comport with that of the California Attorney General's office, which opined on May 18, 1987, that California's constitutional amendment requires that an official document must be in English to be effective. *See, e.g.*, April 9, 1987 Letter from Floyd Shimomura, Deputy Atty. Gen'l, to Richard Martland, Chief Asst. Atty. Gen'l, discussed in Califa, "Declaring English the Official Language: Prejudice Spoken Here," 24 HARV. C.R.-C.L. L. REV.293, 348 n. 67 (1989); *Sandoval v. Hagan*, __ F. Supp. __, 1998 WL 295891 (M.D. Alabama, 1998), slip op. 145, n. 78 (same letter introduced as Plaintiffs' Exhibit 16).

deprivation bars "[m]eaningful communication" with "thousands of limited-English-proficient and non-English-speaking persons in Arizona" in violation of the rights of the government officials and employees. App. 32a, ¶ 51.

The court found that Art. XXVIII cannot be characterized as a content- and viewpoint-neutral ban, and that it had a chilling effect reinforced by the possibility of citizen suits against violators. App. 36a-37a, ¶¶ 58, 59. Ultimately, the court concluded that Art. XXVIII "violates the First Amendment." App. 37a, ¶ 59.

The court's opinion did not mention "government speech" or any case describing the rights of government to "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message", *Rosenberger*, 515 U.S. at 833, despite the fact that the doctrine was briefed and argued to the court. State's Supp. Br. 11-13; AOE Br. 5-6.

The Arizona Supreme Court then examined whether Art. XXVIII violated the Equal Protection Clause of the Fourteenth Amendment. App. 38a, ¶ 60. The court's analysis was based on its finding that Art. XXVIII violated the First Amendment. *Id.* The court said Art. XXVIII must pass strict scrutiny review "because it impinges upon the fundamental First Amendment right to petition the government for redress of grievances." App. 38a, ¶ 61.

Because the court found that Art. XXVIII "curtails First Amendment rights," App. 39a, ¶ 62, it rejected the trial court's finding of no violation of the Equal Protection Clause and placed the burden of establishing constitutionality on AOE. *Id.* The court did not address whether a language minority constitutes a suspect class for equal protection purposes. *Id.*, n. 12.

The court found that Art. XXVIII was not narrowly

specific enough to survive strict scrutiny. App. 41a, ¶ 65. "The Amendment's goal to promote English as a common language does not require a general prohibition on non-English usage. English can be promoted without prohibiting the use of other languages. . ." App. 41a, ¶ 65.

The court also said that "[b]y permanently implementing a linguistic barrier between persons and the government they have a right to petition, the Amendment substantially burdens First Amendment rights". App. 42a, ¶ 66.

The court below said that it was not considering the limits of "officially *promoting* English as distinguished from banning non-English speech." App. 44a, ¶ 71. The court vacated the court of appeals' opinion, reversed the trial court's judgment and remanded the matter with instructions to enter judgment. App. 44a, ¶ 73.

REASONS FOR GRANTING THE WRIT

This is a facial challenge to Art. XXVIII; the court below expressly declined to treat this case as an overbreadth claim. App. 37a, n. 11. The original decision of the trial court was made on summary judgment; the provision was never enforced against those who brought this case. Facial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *see also*, *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990)(noting that "facial challenges to legislation are generally disfavored"). This is a "heavy burden," *Rust v. Sullivan*, 500 U.S. 173, 183 (1991), and the decision below failed to meet that standard.

Judge Fernandez, in dissent in the Ninth Circuit's decision in *Yniguez,* summarized *Yniguez* in terms which are equally apt here:

> This case, then, presents a confluence of lines of argument. Employees of the State are subject to numerous restrictions upon their freedoms, their actions, and their speech, which the government could not impose upon the general public. The State can, in general, control the content and mode of its own speech, and the general public does not have a constitutional right to have the State provide services in any particular language. In the face of all of that, it is well neigh unintelligible to say that individual officers and employees of the State can perform state business in a language of their own choice, despite the State's direction that they shall use a particular language.

Yniguez, 69 F.3d at 958 (Fernandez, J., dissenting).

Federal courts are increasingly faced with decisions affected by governmental choice of language, including both claims for non-English-language services and challenges to governmental language choices. *See, e.g., Sandoval v. Hagan*, _ F.Supp. __ (M.D. Ala. 1998)(striking down English language drivers license examination as discriminatory); *Valeria G. v. Wilson*, __ F.Supp. ___ (N.D. Cal., July 15, 1998, No. C 98-2252 CAL)(rejecting constitutional challenge to implementation of initiative requiring English language instruction); *Carbajal v. Albuquerque Public School Dist*, Civ. 98-0279-MV/DIS (D. N.M.)(language minority children challenging public school system's failure to teach them English). These and other courts need guidance, and the decision below could mislead courts reviewing similar cases.

The decision below conflicts with settled decisions of this and other federal courts, ignores the proper role of the First Amendment, and injects erroneous constitutional theories into

current national political controversies. The decision below can be seen as inappropriately breathing new life into the vacated Ninth Circuit decision in *Yniguez*. The decision below will cause a new round of language-related constitutional challenges to governmental decisions. The decision below should be reviewed.

I. A STATE'S OFFICIAL LANGUAGE DOES NOT OFFEND THE FIRST AMENDMENT:

A. The Decision Below Conflicts With This Court's Decisions Involving "Government Speech."

One threshold step in any First Amendment speech case is to identify the speaker. Here the government itself is the speaker, Art. XXVIII, § 1(3), yet there is no mention in the decision below of government's rights to control its own speech. By ignoring government's own rights, the decision below distorts the analysis of government's power in a manner which will both mislead other courts and interfere with on-going public controversies.

This Court's unconstitutional conditions precedents lie on a "speech spectrum" ranging from private persons to government employees. *Board of County Commissioners, Wabaunsee County v. Umbehr*, 518 U.S. 668, 674-75 (1996).[7] Government's interest in speech depends on the speaker's proximity to government; the closer to government,

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[7]This speech spectrum ranges from "government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to . . . users of public facilities . . . and recipients of small government subsidies, who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing." 518 U.S. at 674-75 (citations omitted).

the greater government's interest. *Id.*; *Rosenberger*, 515 U.S. at 833; *Rust*, 500 U.S. at 192-96.

Government's own speech is the closest to government, so government's control over its own speech is at a maximum. *Rosenberger*, 515 U.S. at 893, n. 11 (Souter, J., dissenting)("authority to make content-related choices is at its most powerful when the State undertakes" to advance its own speech).

The State can choose its own message when it is the speaker. "The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139 n.7 (1973)(Stewart, J., concurring). More recently, this Court said "when the State is the speaker, it may make content-based choices." *Rosenberger*, 515 U.S. at 833; *see also National Endowment for the Arts v. Finley*, __ U.S. __, ___, No. 97-371, June 25, 1998 (recognizing government as "speaker," "buyer" and "patron").

Government may restrict its employees' expression to avoid the appearance of its endorsement or imprimatur. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988)(school district may insure that it is not associated with speaker's views or with any position on matters of political controversy). *See also id.* at 288-89 (Brennan, J., dissenting, but agreeing that the risk of erroneous attribution of views to the school might justify some restrictions on expression).

Similarly, "we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger*, 515 U.S. at 833. And when the

government disburses public funds to private entities to convey a governmental message, the government "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantees." *Rosenberger*, 515 U.S. at 833.

This is a "government speech" case. By its terms, Art. XXVIII applies only to "the legislative, executive and judicial branches of government," Art. XXVIII, Section 1(3)(a)(i), and "all government officials and employees **during the performance of government business.**" *Id.*, Section 1(3)(a)(iv) (emphasis added). The standard of review when government is the speaker is whether the government's choice is "so irrational that it may be branded 'arbitrary'." *Kelley v. Johnson*, 425 U.S. 238, 248 (1976).

Numerous courts have found that language requirements are rational. For example, the Second Circuit, in *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), found no constitutional objection to government notices in English:

> We need only glance at the role of English in our national affairs to conclude that the Secretary's actions are not irrational. Congress conducts its affairs in English, the executive and judicial branches of government do likewise. In addition those who wish to become naturalized United States citizens must learn to read English. 8 U.S.C. § 1423 (Supp. 1978) . . . Given these factors, it is not irrational for the Secretary to choose English as the one language in which to conduct her official affairs.

717 F.2d at 42-43. *See also*, *Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994)(per curiam)(no right to government notices in French – applying the "broadly stated and thoroughly sensible ruling in *Soberal-Perez*"); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973)(California's

choice to use English has reasonable basis); *Guadalupe Org.*, 587 F.2d at 1027 (no constitutional right to multilingual education); *Vialez v. New York City Housing Auth.*, 783 F.Supp. 109, 124 (S.D.N.Y. 1991)("Nothing could be fairer than to apply the English language uniformly to all tenants of whatever national origin"); *Alfonso v. Board of Review*, 89 N.J. 41, 444 A.2d 1075, 1077, *appeal dismissed and cert. denied*, 459 U.S. 806 (1982)(decision on requiring translation best left to political branches).

Even *Meyer v. Nebraska*, 262 U.S. 390 (1923), relied on by both the Ninth Circuit in *Yniguez* and the court below, App. 39a-41a, ¶¶ 63-64, said, "[t]he power of the State to . . . make reasonable requirements for all schools, including a requirement that they shall give instructions in English, is not questioned." 262 U.S. at 402.

Not withstanding its importance in First Amendment analysis, the government speech doctrine cannot be found in the decision below. There is no mention of any right by government to choose its own message, to direct how the message is to be delivered, or to prevent garbling or distortion. The failure to recognize the government speech doctrine in a case involving only government speech conflicts with several of this Court's most recent First Amendment holdings (discussed above).

Under the decision below, government does not have control over its own speech. It cannot choose the content of its own actions and those of its employees. It cannot ensure that its message is not garbled or distorted. Those decisions lie in the hands of government employees and claimants for government services, who can unilaterally decide how government will communicate.

A court reviewing a challenge to government speech must consider government's own rights. The court below simply

ignored them.

The court below may have been misled by the vacated Ninth Circuit opinion it was following. In *Yniguez*, Judge Reinhardt acknowledged government's speech rights in a footnote, but thought they were limited to government's control of the speech of third parties. 69 F.3d at 940, n. 24. But that interpretation ignores the plain words of *Rosenberger* ("when it [the government] is the speaker"), 515 U.S. at 833, and suggests that government has less control over its own speech and the speech of its employees on the job than over the speech of private contractors. Such an interpretation would violate the speech spectrum recognized in *Umbehr*. 518 U.S. at 674-75.

This Court should review the decision below to protect the government speech doctrine and the legitimate rights of government to control its own speech.

B. The Decision Below Conflicts With This Court's Decisions Involving Government Employees' Speech:

This Court has long permitted government employers to regulate government employees' expression if the speech affects the employees' work. *Kelley v. Johnson*, 425 U.S. 238 (1976)(personal appearance of employees can be regulated); *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557-65 (1973)(political activities can be regulated).

Leaving aside violations of the government speech doctrine, the decision below conflicts with other courts' decisions on government employees' speech and expands the rights of government employees to speak on the job. For example, the court below quotes *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) for the proposition that "employee commenting on matters of public

concern has right to speak, subject to consideration of governmental efficiency." App. 33a, ¶ 51. Yet *NTEU* was specifically limited in ways the lower court ignored or contradicted. Employees' rights to comment on matters of public concern are those of "citizens" and do not apply to speech "as government employees." 513 U.S. at 464. In addition, *NTEU* was careful to apply its First Amendment protections to employees' activities off the job. *Id.* In contrast, Art. XXVIII applies only to government employees' speech on the job.

This Court has never found a First Amendment right to comment "as government employees." If nothing else, this decision will generate what *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-66 (1979), and *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 285-86 (1983), would not: a "special constitutional right to a voice in the making of policy by their government employer." 465 U.S. at 285.

If left unreviewed, this "dangerous notion that government employees have a personal stake in the words they utter when they speak for the government", *Yniguez*, 69 F.3d at 962 (Kozinski, J., dissenting), could spawn numerous challenges to government policies such as the death penalty, affirmative action, or other controversial topics. In fact, the decision below might permit government employees to oppose the State's choice to provide services in languages other than English to the very persons the Arizona court purports to aid. *See e.g., Cota v. Tucson Police Dept.*, 783 F. Supp. 458 (D. Ariz. 1992)(detectives challenged policy that they use Spanish on the job).

The lower courts need guidance on this issue. The Ninth Circuit alone has considered language-related workplace disputes several times in the last decade. *See e.g., Jurado v.*

Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987)(employer could require radio announcer to use English); *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031, 1043 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989)(English-on-the-job rule for court clerks discriminatory; court should hire bilingual supervisors to discipline clerks who use Spanish to utter racial slurs); *id.*, 861 F.2d 1187, 1194 (9th Cir. 1988)(Kozinski, J., dissenting from denial of rehearing *en banc*)(hiring bilingual supervisors instead of African-Americans is a "let them eat cake" approach, which will exacerbate workplace tensions); *Garcia v. Spun-Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228; *id.*, 13 F.3d 296 (Reinhardt, J., dissenting from denial of rehearing *en banc*).

The circuits are split on how to handle public employees' First Amendment claims related closely to their official duties. The D.C. Circuit, voting 5-4 *en banc*, recently applied First Amendment protections to government employees' unapproved travel to speak on topics related to their official duties. *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995). The Sixth Circuit has said that conversations in the course of employment are not protected by the First Amendment. *Thomson v. Scheid*, 977 F.2d 1017, 1021 (6th Cir. 1992), *cert. denied*, 508 U.S. 910 (1993). The Tenth Circuit has said that there is no *per se* exemption from First Amendment protection for officials' speech. *Koch v. City of Hutchinson*, 847 F.2d 1436, 1442 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988). None of these cases, however, involved speech on behalf of the government.

Under the decision below, the government could require an employee to cut his hair and salute the flag, *Kelley v. Johnson*, 425 U.S. at 245-46, but could not tell him what to say on the job. The decision below should be reviewed to-

provide national uniformity and to give guidance to the many courts which will be faced with language-related claims by public employees.

C. The Decision Below Contradicts This Court's Decisions on Public Forum Speech:

The decision below also ignores or contradicts this Court's First Amendment forum analysis. First Amendment protection for speech depends, in part, on whether the speech is made in a public forum. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)(nonpublic forum is "public property which is not by tradition or designation a forum for public communication").

Government speech is the least public of all fora. There is no right to take over the government or force it to support a view other than that it wishes to espouse. *Rust*, 500 U.S. at 194 (when Congress chose to establish National Endowment for Democracy, it was not required to fund programs encouraging totalitarianism). Nor do government employees have, by right of their positions, constitutional rights to pontificate on policy issues. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-66 (1979); *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 285-86 (1983).

Yet the decision below treats the provision of government services and the interaction with government employees as public fora. Analogizing to the right to petition, App, 31a-32a, ¶ 50, the court below finds that there is a First Amendment right to force the government to listen to speech of any type or in any fashion the speaker wishes. This position would create public fora whenever a topic of discussion is of public concern. This finding contradicts settled decisions of this Court, and, as Judge Kozinski

predicted in dissent in *Yniguez*, will lead to numerous conflicts over this new right to use the courts to force government actions.

A State's choice to use an official language does not offend the First Amendment. The decision below would limit this choice to symbolic acts of encouragement. This limit, however, conflicts with established law, ignores basic rights, and creates troubling new entitlements. The decision should be reviewed.

II. A State's Official Language Does Not Offend Equal Protection:

A. The Decision Below Conflicts With This Court's Decisions On Facial Invalidity and Overbreadth:

The courts below found no evidence of discriminatory intent in the record of this summary judgment case. Nor was Art. XXVIII ever applied against these plaintiffs. Since legislation should not be invalidated on the basis of "its hypothetical application to situations not before the Court," *NEA*, __ U.S. at __, *quoting FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978), the court below should not have found an Equal Protection violation. Thus, these plaintiffs should have had a difficult time proving facial invalidity, "since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Nevertheless, the court below found a violation of Equal Protection based primarily on its finding that Art. XXVIII violates the First Amendment. App. 39a, ¶ 62. Thus, the court below held that the burden shifted to AOE to establish the constitutionality of Art. XXVIII. *Id.*

This burden-shifting transforms facial invalidity analysis into overbreadth analysis. Since overbreadth analysis is

available only in First Amendment cases, the Arizona court's Equal Protection reasoning was fatally flawed and could confuse other courts. The decision below should be reviewed to reinforce traditional facial invalidity analysis.

B. The Decision Below Contradicts Other Courts' Holdings that Language Is Not A Suspect Characteristic:

Nor can Art. XXVIII be construed as national origin discrimination, since it deals only with language. A rule equating language with national origin has no basis in legislative history or fact.

Neither the Fourteenth Amendment nor federal laws define "national origin." This Court has noted that the legislative history concerning the meaning of national origin is "quite meager." *Espinoza v. Farah Mgf. Co.*, 414 U.S. 86, 88 (1973). The term on its face refers to the "country where a person was born, or, more broadly, the country from which his or her ancestors came." *Id.*; *see also, Pejic v. Hughes Helicopters*, 840 F.2d 667, 672-3 (9th Cir. 1988)(persons of Serbian national origin are members of protected class under Title VII).

Language does not easily fit into that history. The language a person speaks does not correspond to the usual characteristics of national origin or of a suspect classification under the Fourteenth Amendment. Language classifications do not indicate with requisite specificity the country a person or a person's ancestors came from; at least 13 countries, for example, have Spanish as their official or national language. A. Blaustein and D. Epstein, *Resolving Language Conflicts: A Study of the World's Constitutions* (1986). Nor is language an immutable characteristic.

This Court has never held that language can be equated to

national origin. Urged to take such a position in *Hernandez v. New York*, 500 U.S. 352 (1991), the Court did not.

Many other courts, however, have held that language cannot be equated with national origin and language minorities are not automatically suspect classes. *See, e.g., Soberal-Perez*, 717 F.2d at 41 ("Language, by itself, does not identify members of a suspect class."); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975)(English language civil service examinations did not affect suspect class); *Carmona v. Sheffield*, 475 F.2d at 739 (California's choice to use English has reasonable basis); *Guadalupe Org.*, 587 F.2d at 1027 (language choice in school a political matter); *Vialez v. New York City Housing Auth.*, 783 F.Supp. at 124 ("Nothing could be fairer than to apply the English language uniformly to all tenants of whatever national origin").

Yet at least one federal court has used the decision in this case to strike down State English-language requirements. *Sandoval v. Hagan*, __ F.Supp. ___, 1998 WL 295891 (M.D. Ala. 1998)(equating language and national origin and striking English-language requirement for drivers license examinations because it disparately impacts persons from many different countries). Other courts may follow, encouraged to ignore the precision required to determine Equal Protection classifications appropriately. That would violate this Court's teaching: "The earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds." *Holland v. Illinois*, 493 U.S. 474, 488 (1990).

A better approach would be to determine, on an "as-applied" basis, if a particular challenged activity violates existing proscriptions. That could not be done in this case, because the state of the record does not permit it. The court

below ignored these rules and simply reversed the burden of proof. The decision should be reviewed to protect against the distortion of existing prohibitions and the creation of unwarranted new suspect classes.

III. The Decision Below Injects Erroneous Constitutional Theories Into A Current National Political Debate:

The degree to which government can choose languages for internal operations is a topic of national debate. Twenty-two States have adopted English as their official languages.[8] On June 2, 1998, California voters overwhelmingly adopted an initiative designed to teach children in English instead of in their native tongues. California Secretary of State, *State Ballot Measures*, http://primary98.ss.ca.gov/Returns/prop. Congress is currently debating whether to end similar federal support for native language instruction. *See, e.g.*, H. Rep. 105-587. A major topic in the debate over a bill to permit

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[8]**Alabama**: Ala. Const. Amend. 509 (1990); **Arizona**: Ariz. Const. Art. XXVIII (1988); **Arkansas**: Ark. Stat. Ann. 1-4-117 (1987); **California**: Cal. Const. Art. III, § 6 (1986); **Colorado**: Colo. Const. Art. II, § 30 (1988); **Florida**: Fla. Const. Art. II, § 9 (1988); **Georgia**: Ga. Code Ann. § 50-3-30 (1986); **Hawaii**: Hawaii Const. Art. XV, § 4 (1978; Hawaiian is second official language); **Illinois**: Ill. Rev. Stat. Ch. 1, § 3005 (1969); **Indiana**: Ind. Code Ann. § 1-2-10-1 (1984); **Kentucky**: Ky. Rev. Stat. § 2.013 (1984); **Mississippi**: Miss. Code Ann. § 3-3-31 (1987); **Montana**: Mont. Code Ann. § 1-1-510 (1995); **Nebraska**: Neb. Const. Art. I, § 27 (1920); **New Hampshire**: 1995 N.H. Laws 157 (1995); **North Carolina**: N.C. Gen. Stat. Ch. 145, § 12 (1987); **North Dakota**: N.D. Cent. Code, § 54-02-13 (1987); **South Carolina**: S.C. Code Ann. § 1-1-(696-698) (1987); **South Dakota**: S.D. Codified Laws Ann. §§ 1-27-20 to 1-27-26 (1995); **Tennessee**: Tenn. Code Ann. § 4-1-404 (1984); **Virginia**: Va. Code § 22.1-212.1 (1950); **Wyoming**: Wyo. St. 8-6-101 (1996).

Puerto Rico to become a state is government language policies. CONG. REC. (daily ed.) March 4, 1998, H772 - H 837.

The decision below will distort these debates, turning a quintessentially political choice, *Guadalupe Org.*, 587 F.2d at 1027, into a constitutional mandate for multilingualism on demand.

The decision below improperly ignores and limits the government speech doctrine, conflicts with other courts' decisions, and injects its erroneous reasoning into important current political debates. The lower court opinion should be reversed.

CONCLUSION

For the reasons stated, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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July 23, 1998

APPENDIX

No._____

In The

Supreme Court of the United States

October Term 1997

Arizonans for Official English and Robert D. Park,
Petitioners

v.

State of Arizona; Jane Dee Hull, Governor of Arizona; Grant Woods, Attorney General of Arizona; Armando Ruiz; Linda Aguirre; John Philip Evans; Rosie Garcia; Candido Mercado; Manuel Peña, Jr.; Peter Rios, Jr.; Macario Saldate IV; Federico Sanchez; and Victor Soltero
Respondents

APPENDIX

to Petition for Writ of Certiorari to the Supreme Court of the State of Arizona

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July 23, 1998

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IN THE SUPREME COURT
OF THE STATE OF ARIZONA
En Banc

ARMANDO RUIZ, LINDA AGUIRRE, JOHN PHILIP EVANS, ROSIE GARCIA, CANDIDO MERCADO, MANUEL PENA, JR., PETER RIOS, JR., MACARIO SALDATE IV, FEDERICO SANCHEZ and VICTOR SOLTERO, Plaintiffs-Appellants-Cross-Appellees,	)
v.	)
JANE DEE HULL, GOVERNOR OF ARIZONA; GRANT WOODS, ATTORNEY GENERAL OF ARIZONA; STATE OF ARIZONA; ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK, Intervenors, Defendants/ Appellees-Cross-Appellants.	)

Supreme Court
No. CV-96-0493-PR
Court of Appeals
No. 1-CA-CV 94-0235
Maricopa County
No. CV 92-19603

OPINION

Appeal from the Superior Court of Maricopa County
The Honorable Jeffrey S. Cates, Judge

REVERSED WITH DIRECTIONS

Opinion of the Court of Appeals, Division One,
____ Ariz. ____, ____ P.2d ____ (App. 1996)

VACATED

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M O E L L E R, JUSTICE

SUMMARY

¶1 This opinion addresses the constitutionality of Article XXVIII of the Arizona Constitution (the "Amendment"), which was adopted in 1988 and which provides, *inter alia*, that English is the official language of the State of Arizona and that the state and its political subdivisions - including all government officials and employees performing government business - must "act" only in English.

¶2 We hold that the Amendment violates the First Amendment to the United States Constitution because it

adversely impacts the constitutional rights of non-English-speaking persons with regard to their obtaining access to their government and limits the political speech of elected officials and public employees. We also hold that the Amendment violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it unduly burdens core First Amendment rights of a specific class without materially advancing a legitimate state interest.

¶3 In making these rulings, we express no opinion concerning the constitutional validity of less restrictive English-only provisions discussed in this opinion. We also emphasize that nothing in this opinion compels any Arizona governmental entity to provide any service in a language other than English.

FACTS AND PROCEDURAL BACKGROUND

I. The Amendment

¶4 In October 1987, Arizonans for Official English ("AOE") initiated a petition drive to amend Arizona's constitution to designate English as the state's official language and to require state and local governments in Arizona to conduct business only in English. As a result of the general election in November 1988, the Amendment was added to the Arizona Constitution, receiving affirmative votes from 50.5% of Arizona citizens casting ballots. *See Yniguez v. Arizonans for Official English* ("AOE"), 69 F.3d 920, 924 (9th Cir. 1955) (en banc).[1] The Amendment, entitled

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[1]As pointed out *infra*, the Ninth Circuit's opinion in *Yniguez v. AOE* was vacated by the United States Supreme Court because Yniguez lacked standing. *AOE v. Arizona*, 117 S.Ct. 1055 (1997), *vacated on remand, Yniguez v. AOE*, 118 F.3d 667 (9th Cir. 1997). On the merits of the case, however, we agree with the result and with much of the

"English as the Official Language," is set forth in full in the Appendix and provides that "[t]he State and all political subdivisions of [the] State shall act in English and in no other language." The Amendment binds all government officials and employees in Arizona during the performance of all government business, and provides that any "person who resides in or does business in this State shall have standing to bring suit to enforce this article in a court of record of the State."

II. Yniguez v. Mofford

¶5 Two days after the voters passed the Amendment, Maria-Kelly F. Yniguez sued the State of Arizona, the Governor, and various parties pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Arizona, seeking to enjoin enforcement of the Amendment and to have it declared unconstitutional under the First and Fourteenth Amendments. She also contended that it violated federal civil rights laws. *Yniguez v. Mofford*, 730 F.Supp. 309 (D. Ariz. 1990). When she filed her action, Yniguez was employed by the Arizona Department of Administration and handled medical malpractice claims asserted against the state. Yniguez was bilingual, fluent and literate in both Spanish and English, and, prior to the Amendment's passage, she communicated in Spanish with monolingual Spanish-speaking claimants and in a combination of English and Spanish with bilingual claimants. *Id.* at 310.

¶6 By the time the district court ruled, only the Governor

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reasoning of the Ninth Circuit opinion. Thus, we refer to the Ninth Circuit opinion throughout this opinion, recognizing that it has been vacated on grounds unrelated to the merits of the issues with which we are presented.

remained as a defendant. *Id.* The district court granted declaratory relief, finding that the Amendment was facially overbroad in violation of the First Amendment. *Id.* at 313. Injunctive relief, however, was denied because there was no enforcement action pending against Yniguez. *Id.* at 317. The Governor did not appeal the decision. The Attorney General of Arizona, AOE, and Robert D. Park, a principal sponsor of the Amendment, then moved to intervene for purposes of pursuing an appeal. The district court denied the motion. *Yniguez v. Mofford*, 130 F.R.D. 410 (D. Ariz. 1990).

¶7 The Ninth Circuit Court of Appeals reversed the district court's denial and also allowed Arizonans Against Constitutional Tampering, the principal opponent of the Amendment, to intervene as plaintiffs-appellees. *Yniguez v. AOE*, 42 F.3d 1217, 1223-24 (9th Cir. 1994). The intervention of the Arizona Attorney General was permitted for the limited purpose of urging adoption of his narrow interpretation of the Amendment discussed below ir, alternatively, to urge the certification of the interpretation of the Amendment to this court pursuant to Arizona Revised Statutes Annotated ("A.R.S.") § 12-1861.[2]

¶8 The State of Arizona filed a suggestion of mootness because Yniguez was no longer employed by the State of Arizona. The court of appeals rejected the suggestion of

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[2]The Ninth Circuit affirmed the district court's denial of the Arizona Attorney General's Motion to Intervene insofar as he sought to be reinstated as a party in the appeal, but permitted the intervention for the limited purpose described. *See Yniguez v. Arizona*, 939 F.2d 727, 740 (9th Cir. 1991). The district court had refused to certify the question of the proper interpretation of the Amendment to this court, ruling that certification was inappropriate because the Amendment is not susceptible of a narrowing construction, and therefore could not be held constitutional. *See Yniguez v. Mofford*, 130 F.R.D. at 411.

mootness, reasoning that Yniguez had a right to appeal the district court's failure to award nominal damages to her and, therefore, had a sufficient concrete interest in the outcome of the litigation to confer standing to pursue declaratory relief. *Yniguez v. Arizona*, 975 F.2d 646, 647 (9th Cir. 1992) (citations omitted).

¶9 AOE appealed the district court's judgment that declared the Amendment unconstitutional and Yniguez cross-appealed the denial of nominal damages. A panel of the Ninth Circuit Court of Appeals agreed with the district court that the Amendment is unconstitutionally overbroad and also held that Yniguez was entitled to nominal damages. *Yniguez v. AOE*, 42 F.3d at 1229, 1243. The Ninth Circuit then reheard the case en banc and affirmed. *Yniguez v. AOE*, 69 F.3d at 947.

¶10 AOE petitioned for certiorari to the United States Supreme Court, which granted the petition and ordered additional briefing on whether the petitioners had standing to maintain the action and whether there remained a federal case or controversy with respect to Yniguez, in light of the fact that she was no longer employed by the State of Arizona. In a unanimous decision, the Supreme Court vacated the Ninth Circuit opinion and remanded to that court with directions that the action be dismissed. *AOE v. Arizona*, 117 S.Ct. 1055, 1075 (1997). The Court held there was no case or controversy to support federal court jurisdiction and determined that the lower court decisions should be vacated because the Ninth Circuit should have certified the construction of the Amendment to this court. *Id.* at 1074. In doing so, the Court expressed no opinion on the constitutionality of the Amendment. *Id.* at 1060.

III. This Litigation

¶11 In November 1992, the ten plaintiffs in this case brought an action in superior court against then-Governor J. Fife Symington, III and the Attorney General. On September 5, 1997, Governor Symington resigned and was succeeded by Jane Dee Hull, who has been substituted pursuant to Rule 27(c)(1) of the Arizona Rules of Civil Appellate Procedure. The plaintiffs sought a declaratory judgment that the Amendment violates the First, Ninth, and Fourteenth Amendments of the United States Constitution. The plaintiffs are four elected officials,[3] five state employees, and one public school teacher. They are all bilingual and regularly communicate in both Spanish and English as private citizens and during the performance of government business. Plaintiffs allege that they speak Spanish during the performance of their government jobs and that they "fear communicating in Spanish 'during the performance of government business' in violation of Article XXVIII of the Arizona Constitution."

¶12 The principal sponsors of the Amendment, AOE and Robert D. Park, AOE's spokesperson, intervened as defendants. On cross-motions for summary judgment, the superior court ruled that the Amendment is constitutional, finding that it (1) is a content-neutral regulation that does not violate the First Amendment; (2) does not violate the Equal Protection Clause of the Fourteenth Amendment because there is no proof of discriminatory intent; and (3) does not violate the Ninth Amendment because it does not

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[3]Arizona State Senator Joe Eddie Lopez was substituted for retired Senator Manuel Pena by this court's order of May 2, 1997.

protect choice of language.[4] The trial court denied AOE's request for attorneys' fees pursuant to A.R.S. § 12-2030, and AOE appealed that denial. Under this opinion, AOE is no longer a prevailing party so we do not discuss its request for attorneys' fees further.

¶13 On appeal, the court of appeals reversed in part and affirmed in part. *Ruiz v. AOE*, 1996 WL 309512, 218 Ariz. Adv. Rep. 9 (App. 1996). Citing the principle of judicial comity, the court held that "it is appropriate for us to exercise our discretion and defer to the federal litigation and thereby accept the construction of Article [XXVIII] and the analysis that was set forth by the Ninth Circuit." 1996 WL 309512 at *4, 218 Ariz. Adv. Rep. at 12. The state defendants petitioned this court for review, which we granted. In 1996, we stayed all proceedings pending the supreme Court's decision in *AOE v. Arizona*.

¶14 As already noted, in 1997 the United States Supreme Court held that Yniguez' federal court claim was moot and remanded with directions that it be dismissed. Plaintiffs then filed a motion in this court to lift the stay and requested leave to submit supplemental briefs and for oral argument. AOE filed a motion to vacate our order granting review. AOE maintained, in essence, that there was no court of appeals decision for this court to review because the court of appeals had adopted the Ninth Circuit's construction and analysis of the Amendment, *see Yniguez v. AOE*, 69 F.3d at 947, and the United States Supreme Court had vacated the Ninth Circuit's opinion was "eradicated." Thus, AOE requested us to either affirm the trial court's judgment or to return the matter to the court of appeals for consideration. We denied AOE's motion

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[4]No Ninth Amendment issue has been presented to us on appeal.

to vacate the order granting review and granted plaintiffs' motion to lift the stay.

¶15 This court then received supplemental briefing and heard oral argument from the parties. In addition, numerous amici curiae briefs were filed on behalf of a host of organizations and individuals. We reviewed, considered, and appreciate the many amici briefs which advanced varying positions in this case. However, in accordance with our practice, we base our opinion solely on legal issues advanced by the parties themselves. *See Town of Chino Valley v. City of Prescott* 131 Ariz. 78, 84, 638 P.2d 1324, 1330 (1981), *appeal dismissed*, 457 U.S. 1101, 102 S.Ct. 2897, *reh. denied*, 459 U.S. 899 (1982), citing *City of Tempe v. Prudential Ins. Co.*, 109 Ariz. 429, 510 P.2d 745 (1973) (holding that amici curiae are not permitted to create, extend, or enlarge issues beyond those raised and argued by the parties). Because we resolve the case on the merits as presented by the parties, we do not discuss the concerns referred to in the special concurrence because, as the special concurrence itself observes, the parties have not raised, briefed, or argued any matter referred to by the special concurrence.

¶16 We have jurisdiction pursuant to A.R.S. § 12-102.21.

ISSUES

¶17 1. Whether the trial court erred by ruling that the Amendment did not violate the First Amendment to the United States Constitution because it was content-neutral, did not reach constitutionally-protect free speech rights, and was thus not fatally overbroad.

¶18 2. Whether the trial court erred by concluding that the Amendment did not violate the Fourteenth Amendment to the United States Constitution because

there was no proof of discriminatory intent.

DISCUSSION

I. Introduction

¶19 Plaintiffs contend that the Amendment is a blanket prohibition against all publicly elected officials and government employees using any language other than English in the performance of any government business. Therefore, they reason that the Amendment is a content-based regulation of speech contrary to the First Amendment. Plaintiffs also argue that the Amendment constitutes discrimination against non-English-speaking minorities, thereby violating the Equal Protection Clause of the Fourteenth Amendment. AOE and the state defendants respond that the Amendment should be narrowly read and should be construed as requiring the use of English only with regard to "official, binding government act." They argue that this narrow construction renders the Amendment constitutional.

¶20 At the outset, we note that this case concerns the tension between the constitutional status of language rights and the state's power to restrict such rights. On the one hand, in our diverse society, the importance of establishing common bonds and a common language between citizens is clear. *Yniguez v. AOE*, 69 F.3d at 923, citing *Guadalupe Organization, Inc. v. Tempe Elementary Sch. Dist.*, 587 F.2d 1022, 1027 (9th Cir. 1978). We recognize that the acquisition of English language skills is important in our society. For instance, as a condition to Arizona's admission to the Union, Congress required Arizona to create a public school system and provided that "said schools shall always be conducted in English." Act of June 20, 1910, ch. 310, § 20(4). That same Act requires all state officers and members of the Legislature to have the "ability to read, write, speak

and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter." *Id.*, § 20(5). Also, the Sixth Amendment permits an English language requirement for jurors. *United States v. Benmuhar*, 658 F.2d 13, 18-20 (1st Cir. 1981) (noting that state's significant interest in having branch of national court system operate in national language rebutted defendant's prima facie showing that English proficiency requirements for jurors resulted in under representation). Congress has recognized the importance of understanding English in such matters as naturalization legislation, 8 U.S.C. § 1423, and the need for the education of non-English-speaking students, Equal Educational Opportunity Act of 1974, 20 U.S.C. §§ 1701-1758. Indeed, Arizona law mandates that school districts in which there are pupils who have limited English proficiency[5] shall provide programs of bilingual instruction or English as a second language with a primary goal of allowing the pupils to become proficient in English in order to succeed in classes taught in English. A.R.S. § 15-752. Finally, the importance of acquiring English skills is emphasized in the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1255a(b)(1)(D), which legalizes resident status of illegal immigrants who demonstrate progress toward learning English, and terminates legal residence for those who make little or no progress, 8 U.S.C. § 1255a(b)(2)(C).

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[5]"Limited English proficient" is defined as having a "low level of skill in comprehending, speaking, reading or writing the English language because of being from an environment in which another language is spoken." A.R.S. § 15-751(1). Article 20, paragraph 7 of the Arizona Constitution provides that Arizona public schools shall be conducted in English.

¶21 Indeed, English is also the language of political activity through initiative petition. *See Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988) (providing that initiative petitions that are printed only in English are not covered by and do not offend provisions of the Voting Rights Act); *accord Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988).

¶22 However, the American tradition of tolerance "recognizes a critical difference between encouraging the use of English and repressing the use of other languages." *Yniguez v. AOE*, 69 F.3d at 923. We agree with the Ninth Circuit's statement that Arizona's rejection of that tradition by enacting the Amendment has severe consequences not only for Arizona's public officials and employees, but also for the many thousands of persons who would be precluded from receiving essential information from government employees and elected officials in Arizona's governments. *Id.* If the wide-ranging language of the prohibitions contained in the Amendment were to be implemented as written, the First Amendment rights of all those person would be violated, *id.*, a fact now conceded by the proponents of the Amendment, who, instead, urge a restrictive interpretation in accordance with the Attorney General's narrow construction discussed below.

¶23 By this opinion, we do not imply that the intent of those urging passage of the Amendment or of those who voted for its stemmed from linguistic chauvinism or from any other repressive or discriminatory intent.[6] Rather we assume,

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[6]We fully recognize that the power of the people to legislate is as great as that of the Legislature. *See* Ariz. Const. art. IV; *Salt River Pima-Maricopa Indian Community v. Hull*, 190 Ariz. 97, 103, 945 P.2d 818, 824 (1977); *Queen Creek Land & Cattle Corp. v. Yavapai County Board of Sup'rs*, 108 Ariz. 449, 451, 501 P.2d 391, 393 (1972).

without deciding, that the drafters of the initiative urged passage of the amendment to further social harmony in our state by having English as a common language among its citizens.

¶24 This court must interpret the Amendment as a whole and in harmony with other portions of the Arizona Constitution. *See ex rel. Nelson v. Jordan*, 104 Ariz. 193, 196, 450 P.2d 383, 386 (1969); *State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 398, 265 P.2d 447, 452 (1953). And, if possible, we must construe the Amendment to avoid conflict with the United States Constitution. *AOE v. Arizona*, 117 S.Ct. at 1074.

¶25 Every duly enacted state and federal law is entitled to a presumption of constitutionality. *Town of Lockport v. Citizens for Community Action at Local Level, Inc.*, 430 U.S. 259, 272-73, 97 S.Ct. 1047, 1055-56 (1977); *Eastin v. Broomfield*, 116 Ariz. 576, 580, 570 P.2d 744, 748 (1977). The presumption applies equally to initiatives as well as statutes, and where alternative constructions are available, the court should choose the one that results in constitutionality. *Slayton v. Shumway*, 166 Ariz. 87, 92, 800 P.2d 590, 595

However, we note that the search for the people's intent in passing initiatives is far different from the attempt to discern legislative intent: there are no legislative hearing transcripts, committee reports or other legislative history. Before an initiative is passed, no committee meetings are held; no legislative analysts study the law; no floor debates occur; no separate representative bodies vote on the legislation; no reconciliation conferences are held; no amendments are drafted; no executive official wields a veto power and reviews the law under that authority; and it is far more difficult for the people to "reconvene" to amend or clarify a law if a court interprets it contrary to the voters' intent. *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 Yale L.J. 107, 109 (1955).

(1990); *Hernandez v. Frohmiller*, 68 Ariz. 242, 249, 204 P.2d 854, 859 (1949). However, as discussed more fully below, where the regulation in question impinges on core constitutional rights, the standards of strict scrutiny apply and the burden of showing constitutionality is shifted to the proponent of the regulation. *See generally Rosen v. Port of Portland*, 641 F.2d 1243, 1246, 1249 (9th Cir. 1981) (laws restricting speech face a heavy presumption against their constitutional validity and proponents bear burden of establishing that they are "narrowly tailored" to further a "compelling" government interest); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576, 111 S.Ct. 2456, 2465-66 (1991) (Scalia, J., concurring). Mindful of these principles, we turn now to an analysis of the constitutionality of the Amendment.

II. Attorney General's Opinion

¶26 On its face, the Amendment provides that, except for some enumerated narrow exceptions, English is the official language of the State of Arizona, of all political subdivisions, of the ballot, the public schools, and government functions and actions. The exceptions pertain to the teaching of English as a second language, matters required by federal law, any matter pertaining to the protection of public health or safety, or of the rights of criminal defendants or victims of crime. *See* Appendix. Before making a facial analysis of the Amendment, however, we must first determine the propriety of adopting the Attorney General's proposed narrowing construction.

¶27 In 1989, shortly after the Amendment was passed, Robert Corbin, then Attorney General, issued an opinion upholding the constitutionality of the Amendment, based upon a narrow construction of the Amendment. Ariz. Att'y

Gen. Op. I89-009 (1989); *see also* Ariz. Att'y Gen. Ops. I89-013 and -014 (1989).

¶28 Opinions of the Attorney General are advisory. *Green v. Osborne*, 157 Ariz. 363, 365, 758 P.2d 138, 140 (1988), and are not binding. *Marston's Inc. v. Roman Catholic Church*, 132 Ariz. 90, 94, 644 P.2d 244, 248 (1982) (in division). However, the reasoned opinion of a state attorney general should be accorded respectful consideration. *See AOE v. Arizona*, 117 S.Ct. at 1073 n.30, citing *Huggins v. Isenbarger*, 798 F.2d 203, 207-10 (7th Cir. 1986) (Easterbrook, J., concurring).

¶29 While we duly consider the Attorney General's proposed narrowing construction, we reject that construction for three substantive reasons, each of which we discuss in turn. First, the proffered narrowing construction does not comport with the plain wording of the amendment, and hence, with the plain meaning rule guiding our construction of statutes and provisions in the Arizona Constitution. Second, it does not comport with the stated intent of the drafters of the amendment. Third, it suffers from both ambiguity and implausibility. Therefore, the narrowing construction is rejected because the Amendment's clear terms are not "readily susceptible" to the constraints that the Attorney General attempts to place on them. *Yniguez v. AOE*, 69 F.3d at 929; *see also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395, 108 S.Ct. 636, 644 (1988) (refusing to accept as authority a non-binding attorney general opinion where narrowing construction advocated by attorney general was not in accordance with the plain meaning of the statute).

A. Plain Meaning Rule

¶30 The Attorney General maintains that although the

Amendment declares English to be Arizona's "official" language, its proscriptions against the use of non-English languages should be interpreted to apply only to "official acts of government." Ariz. Att'y Gen. Op. I89-009, at 5-6. The Attorney General defines "official act" as "a decision or determination of a sovereign, a legislative council, or a court of justice." *Id.* at 7. Although he does not further explain what acts would be official, the Attorney General concludes that the Amendment should not be read to prohibit public employees from using non-English languages while performing their public functions that could not be characterized as official. The Attorney General opines that the provision "does not mean that languages other than English cannot be used when reasonable to facilitate the day-to-day operation of government." *Id.* at 10.

¶31 Somewhat curiously, intervenors now agree with the Attorney General that the Amendment should be held to govern only binding, official acts of the state, which they also seek to construe narrowly as "formal rule-making or rate making . . . or any other policy matters." AOE and the state defendants also point to the definition of "official act" adopted by the court in *Kerby v. State ex rel. Frohmiller*, 62 Ariz. 294, 310-11, 157 P.2d 698, 705-06 (1945). The court there defined "official acts" as "acts by an officer in his official capacity under color and by virtue of his office." *Id.* However, assuming, without deciding, that the government could require official acts to be conducted in English only, nothing in the language of the Amendment remotely supports such a limiting construction.

¶32 To arrive at his interpretation, the Attorney General takes the word "act" from § 3(1)(a) of the Amendment, which provides that, with limited exceptions, the "state and all political subdivisions of this State shall act in English and

in no other language." (Emphasis added.) The Attorney General proposes that the work "act" from § 3(1)(a) should be ascribed to the word "official," found in the Amendment's proclamation that English is the official language of Arizona. Therefore, the Attorney General interprets the Amendment to apply only to the official acts of the state and limits the definition of the noun "act" to a "decision or determination of a sovereign, a legislative council, or a court of justice." Op. Atty. Gen. Az. No. I89-009, at 7 (*quoting Webster's International Dictionary* 20 (3d ed., unabridged, 1976) (third meaning of "act")). We agree with the Ninth Circuit in *Yniguez v. AOE* that the former Attorney General's opinion ignores the fact that "act," when used as a verb as in the Amendment, does not include among its meanings the limited definition he proposed. 69 F.3d at 929. Similarly, section 1(2) of the Amendment also describes English as the language of "all government functions and actions." The amendment does not limit the terms "functions" and "actions" to official acts as urged by the Attorney General, and the ordinary meanings of those terms do not impose such a limitation. *Id.* at 929 n.13. We agree with the district court that originally evaluated the challenges to the Amendment in *Yniguez*: "The Attorney General's restrictive interpretation of the Amendment is in effect a 'remarkable job of plastic surgery upon the face of the [Amendment].'" *Yniguez v. Mofford*, 730 F.Supp. at 316, citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153, 89 S.Ct. 935, 940 (1969).

¶33 We hold that by ignoring the express language of the Amendment, the Attorney General's proposed construction violates the plain meaning rule that requires the words of the Amendment to be given their natural, obvious, and ordinary meaning. *County of Apache v. Southwest Lumber Mills, Inc.*, 92 Ariz. 323, 327, 276 P.2d 854, 856 (1962). By its express

terms, the Amendment is not limited to official governmental acts or to the "formal, policy making, enacting and binding activities of government." Rather, it is plainly written in the broadest possible terms, declaring that the "English language is the language of . . . *all government functions and actions*" and prohibiting all "government officials and employees" at every level of state and local government from using non-English languages "*during the performance of government business*." Amendment, §§ 1(2), 1(3)(a)(iv) (emphasis added).

B. Legislative Intent

¶34 We also believe the Attorney General's proposed construction is at odds with the intent of the drafters of the Amendment. The drafters perceived and obviously intended that the application of the Amendment would be widespread. They therefore inserted some limited exceptions to it. Those exceptions permit the use of non-English languages to protect the rights of criminal defendants and victims, to protect the public health and safety, to teach a foreign language, and to comply with federal laws. Amendment, § 3.2. Regardless of the precise limits of these general exceptions, their existence demonstrates that the drafters of the Amendment understood that it would apply to far more than just official acts.

¶35 For example, one exception allows public school teachers to instruct in a non-English language when teaching foreign languages or when teaching students with limited English proficiency. Such instruction by teachers is obviously not a "formal, policy making, enacting or binding activity by the government," the narrow construction urged by the Attorney General. The exceptions would have been largely, if not entirely, unnecessary under the Attorney General's proposed construction of the Amendment. When construing

statutes, we must read the statute as a whole and give meaningful operation to each of its provisions. *Kaku v. Arizona Board of Regents*, 172 Ariz. 296, 297, 836 P.2d 1006, 1007 (App. 1992).

¶36 In construing an initiative, we may consider ballot materials and publicity pamphlets circulated in support of the initiative. *Bussanich v. Douglas*, 152 Ariz. 447, 450, 733 P.2d 644, 647 (App. 1986). The ballot materials and publicity pamphlets pertaining to the Amendment do not support the Attorney General's limiting construction. In AOE's argument for the Amendment, Chairman Robert D. Park stated that the Amendment was intended to "require the government to *function in English*, except in certain circumstances," and then listed those exceptions set forth in section 4 of the Amendment (emphasis added). Chairman Park's argument then went on to state that "*[o]fficially sanctioned multilingualism causes tension and division within a state*. Proposition 106 [enacting the Amendment] will *avoid that fate* in Arizona." (Emphasis added.) The Legislative Council's argument in support of the Amendment stated that the existence of a multilingual society would lead to "the fears and tensions of language rivalries and ethnic distrust." Arizona Publicity Pamphlet in Support of the Amendment, at 26. Therefore, the Amendment's legislative history supports a broad, comprehensive construction of the Amendment, not the narrow construction urged by the Attorney General.

C. Ambiguity

¶37 The Attorney General's interpretation would unnecessarily inject elements of vagueness into the Amendment. We feel confident that an average reader of the Amendment would never divine that he or she was free to use

a language other than English unless one was performing an official act defined as "a decision or determination of a sovereign, a legislative council, or a court of justice."[7]

¶38 Because we conclude that the narrow construction advocated by the Attorney General is untenable, we analyze the constitutionality of the Amendment based on the language of the Amendment itself.

III. English-Only Provisions in Other Jurisdictions

¶39 Although English-only provisions have recently become quite common, Arizona's is unique. Thus, we receive little guidance from other state courts. Twenty-one states[8] and forty municipalities[9] have official English statutes.

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[7]Although it is unnecessary for us to address the plaintiffs' separate argument that the Amendment, as written, is unconstitutionally vague (because we hold that the Amendment violates the First and Fourteenth Amendments), we do note that the Attorney General's proposed narrowing construction, if adopted, would undoubtedly add weight to the plaintiffs' vagueness argument. A statute is vague if it fails to give fair notice of what it prohibits. *State ex rel. Purcell v. Superior Court*, 111 Ariz. 582, 584, 535 P.2d 1299, 1301 (1975); *see also Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926) (Vagueness if concerned with clarity of law; a law is void on its face, and thereby violates due process, if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application.").

[8]Ala. Const. amend 509 (1990); Ariz. Const. art XXVIII (1988); Ark. Code Ann. § 1-4-117 (1987); Cal. Const. art. III, § 6 (1986); Colo. Const. art. II, § 30a (1988); Fla. Const. art. II § 9 (1988); Ga. Code Ann. § 50-3-100 (1996); Haw. Const. art. XV, § 4 (1978) (also naming Hawaiian as an official language); 5 Ill. Comp. Stat. Ann. 460/20 (West 1993); Ind. Code Ann. § 1-2-10-1 (1984); Ky. Rev. Stat. Ann. § 2.013 (1984); Miss. Code Ann. § 3-3-31 (1987); Mont. Code Ann. § 1-1-510 (1995); Neb. Const. art. 1, § 27 (1920); N.H. Rev. Stat.

However, most of those provisions are substantially less encompassing and certainly less proscriptive than the Amendment. The official English provisions in most states appear to be primarily symbolic. *See, e.g., Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 577 (7th Cir. 1973) (noting that official English law appears with laws naming the state bird and state song, and does not restrict the use to non-English languages by state and city agencies). Indeed, the Amendment has been identified as "by far the most restrictively worded official-English law to date." M. Arrington, Note, *English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 L.J. & Pol. 325, 327 (1991). This observation is shared by other commentators - who note that the Amendment "is the most restrictive of the current wave of official-language laws," and "is so far the most restrictive Official English measure." *See* D. Baron, *The English-Only Question* 21 (1990), and J. Crawford, *Hold Your Tongue* 176 (1992) (emphasis added).

¶40 In contrast to the Amendment, the official English laws that have been enacted in other states are for the most part brief and nonrestrictive. For instance, Colorado's official English law, Colo. Const. § 30, adopted by the initiative process, provides that the "English language is the official language of the State of Colorado. This section is self

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Ann. § 3-C:1 (1995); N.C. Gen. Stat. § 145-12 (1987); N.D. Cent. Code § 54-02-13 (1987); S.C. Code Ann. § 1-1-696 (1987); S.D. Codified Laws § 1-27-20 (1995); Tenn. Code Ann. § 4-1-404 (1984); Wyo. Stat. Ann. § 8-6-101 (Michie 1996).

[9] *See* Cecilia Wong, *Language is Speech: The Illegitimacy of Official English After* Yniguez v. Arizonans for Official English, 30 U.C. Davis L. Rev. 277, 278 (1996).

executing; however, the General Assembly may enact laws to implement this section." Similarly, the official English statute of Arkansas states: "(a) The English language shall be the official language of the State of Arkansas. (b) This section shall not prohibit the public schools from performing their duty to provide equal educational opportunities to all children." Ark. Stat. Ann. 1-4-117. Florida's 1988 official English law is similar: "(a) English is the official language of the State of Florida. (b) The legislature shall have the power to enforce this section by appropriate legislation." Fla. Const. Art. II, § 9 (1988). Indeed, three states have simply enacted a provision which declares that English is the official language of the state: Illinois, 5 Ill. Comp. Stat. Ann. § 460/20; Kentucky, Ky. Rev. Stat. § 2.013; and Indiana, Ind. Code Ann. § 1-2-10-1.

¶41 The more detailed official English laws contain provisions which avoid some of the constitutional questions presented by the Amendment. For instance, Wyoming's law provides, in pertinent part, that:

> (a) English shall be designated as the official language of Wyoming. Except as otherwise provided by law, no state agency or political subdivision of the state shall be required to provide any documents, information, literature or other written materials in any language other than English. (b) A state agency or political subdivision or its officers or employees may act in a language other than the English language for any of the following purposes: (i) To provide information orally to individuals in the course of delivering services to the general public . . . . (vii) To promote international commerce, trade or

tourism.

Wyo. St. 8-6-101.

¶42 Similarly, Montana's official English law protects the free speech rights of state employees and elected officials by allowing them to use non-English languages in the course and scope of their employment, stating in pertinent part:

> This section is not intended to violate the federal or state constitutional right to freedom of speech of government officers and employees acting in the course and scope of their employment. This section does not prohibit a government officer or employee acting in the course and scope of their employment from using a language other than English, including use in a government document or record, if the employee chooses.

Mont. Code Ann. § 1-1-510 (emphasis added) .

¶43 Finally, although California's official English law, passed as an initiative in 1986, is specific and lengthy, it does not prohibit the use of languages other than English.[10] If

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[10]California's Official English law, Cal. Const., Art. III, § 6, provides that:

(a) *Purpose*

English is the common language of the people of the United States of America and the State of California. This section is intended to preserve, protect and strengthen the English language, and not to supersede any of the rights guaranteed to the people by this Constitution.

(b) *English as the Official Language of California*

English is the official language of the State of California.

(c) *Enforcement*

The Legislature shall enforce this section by appropriate legislation. The Legislature and officials of the State of California shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced. The

Arizona's Amendment were merely symbolic or contained some of the express exceptions of the official English provisions discussed above, it might well have passed constitutional muster. We do not express any opinion concerning the constitutionality of less restrictive English-only provisions. We turn now to a discussion of the constitutional questions presented by the Amendment.

IV. Language is Speech Protected by the First Amendment

¶44 Unlike other English-only provisions, the Amendment explicitly and broadly prohibits government employees from using non-English languages even when communicating with persons who have limited or no English skills, stating that all "government officials and employees during the performance of government business" must "act in English and no other language." Amendment, §§ 1(3) (a) (iv), 3(1) (a). It also requires every level and branch of government to "preserve, protect and enhance the role of . . . English . . . as the official language" and prohibits all state and local entities from enacting or enforcing any "law, order, decree or policy which requires the use of a language other than English." §§ 2, 3(1) (b). We agree with the Ninth Circuit that the Amendment "could hardly be more inclusive" and that it "prohibit[s] the

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Legislature shall make no law which diminishes or ignores the role of English as the common language of the State of California.

(d) *Personal Right of Action and Jurisdiction of Courts*

Any person who is a resident of or doing business in the State of California shall have standing to use the State of California to enforce this section, and the Courts of record of the State of California shall have jurisdiction to hear cases brought to enforce this section. The Legislature may provide reasonable and appropriate limitations on the time and manner of suits brought under this section.

use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English." *Yniguez v. AOE*, 69 F.3d at 933.

¶45 Assuming *arguendo* that the government may, under certain circumstances and for appropriate reasons, restrict public employees from using non-English languages to communicate while performing their duties, the Amendment's reach is too broad. For example, by its express language, it prohibits a public school teacher, such as Appellant Garcia, and a monolingual Spanish-speaking parent from speaking in Spanish about a child's education. It also prohibits a town hall discussion between citizens and elected individuals in a language other than English and also precludes a discussion in a language other than English between public employees and citizens seeking unemployment or workers' compensation benefits, or access to fair housing or public assistance, or to redress violations of those rights.

¶46 The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the government for a redress of grievances.

¶47 The First Amendment applies to the states as well as to the federal government. *Gitlow v. New York*, 268 U.S. 652, 665, 45 S.Ct. 625, 630 (1925). The expression of one's opinion is absolutely protected by the First and Fourteenth Amendments. *AMCOR Inv. Corp. v. Cox Ariz. Publications, Inc.*, 158 Ariz. 566, 568, 764 P.2d 327, 329 (App. 1988) (citation omitted); *see also Meyer v. Nebraska*, 262 U.S. 390,

401, 43 S.Ct. 625, 627 (1923) (stating that the United States Constitution protects speakers of all languages). The trial court held that the Amendment is content-neutral, and, therefore, does not violate the First Amendment. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 929-30 (1986). That ruling is flawed.

¶48 "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838, 98 S.Ct. 1535, 1541 (1978) (footnote omitted) (quoting *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437 (1966). We note that the Amendment, Section 3, acknowledges that its mandate that government act only in English is superseded by the use of foreign languages in schools both to enable students to transition to English (subsection 2(a)) and to teach students a foreign language (subsection 2(c)). Subsection 2(b) states that the Amendment's English-only mandate does not apply in instances where foreign language use is required to ensure compliance with federal laws. Therefore, the Amendment would not apply, for instance, with regard to bilingual ballots in Arizona in designated political subdivisions as required by the Voting Rights Act, 42 U.S.C. §§ 1973 aa-la(c) (forbidding states from conditioning the right to vote on the ability to read, write, understand, or interpret English). Nor would it affect a criminal defendant's right to have a competent translator assist him, at state expense, if need be. *See United States ex rel. Negron v. New York*, 434 F.2d 386, 391 (2d Cir. 1970).

¶49 Notwithstanding these limited exceptions, we find that the Amendment unconstitutionally inhibits "the free

discussion of governmental affairs" in two ways. First, it deprives limited- and non-English-speaking persons of access to information about the government when multilingual access may be available and may be necessary to ensure fair and effective delivery of governmental services to non-English-speaking persons. It is not our prerogative to impinge upon the Legislature's ability to require, under appropriate circumstances, the provision of services in languages other than English. *See, e.g.*, A.R.S. § 23-906(D) (Providing that every employer engaged in occupations subject to Arizona's Workers' Compensation statutes shall post in a conspicuous place upon his premises, in English and Spanish, a notice informing employees that unless they specifically reject coverage under Arizona's compulsory compensation law, they are deemed to have accepted the provisions of that law). The United States Supreme Court has held that First Amendment protection is afforded to the communication, its source, and its recipient. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 96 S.Ct. 1817, 1822-23 (1976).

¶50 In his concurring opinion in *Barnes*, Justice Scalia stated, "[W]hen any law restricts speech, even for a purpose that has nothing to do with the suppression of communication . . . , we insist that it meet the high First-Amendment standard of justification." 501 U.S. at 576, 111 S.Ct. at 2465-66. The Amendment contravenes core principles and values undergirding the First Amendment - the right of the people to seek redress from their government - by directly banning pure speech on its face. By denying persons who are limited in English proficiency, or entirely lacking in it, the right to participate equally in the political process, the Amendment violates the constitutional right to participate in and have access to government, a right which is one of the

"fundamental principle[s] of representative government in this country." *See Reynolds v. Sims*, 377 U.S. 533, 560, 566-68, 84 S.Ct. 1362, 1381, 1383-85 (1964). The First Amendment right to petition for redress of grievances lies at the core of America's democracy. *McDonald v. Smith*, 472 U.S. 479, 482-83, 485, 105 S.Ct. 2787, 2790, 2791 (1985). *United Mine Workers of America v. Illinois State Bar Assn*, 389 U.S. 217, 222, 88 S.Ct. 352, 256 (1967) (right to petition is "among the most precious liberties safeguarded by the Bill of Rights"). In *Board of Education v. Pico*, 457 U.S. 853, 867, 102 S.Ct. 2799, 2808 (1982), the Court recognized that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press and political freedom."

¶51 The Amendment violates the First Amendment by depriving elected officials and public employees of the ability to communicate with their constituents and with the public. With only a few exceptions, the Amendment prohibits all public officials and employees in Arizona from acting in a language other than English while performing governmental functions and policies. We do not prohibit government offices from adopting language rules for appropriate reasons. We hold that the amendment goes too far because it effectively cuts off governmental communication with thousands of limited-English-proficient and non-English-speaking persons in Arizona, even when the officials and employees have the ability and desire to communicate in a language understandable to them. Meaningful communication in those cases is barred. Under such circumstances, prohibiting an elected or appointed governmental official or an employee from communicating with the public violates the employee's and the official's rights. *See e.g., United States v. National Treasury*

Employees Union, 513 U.S. 454, 465-66, 115 S.Ct. 1003, 1012 (1995) (employee commenting on matters of public concern has right to speak, subject to considerations of governmental efficiency); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223, 109 S.Ct. 10013, 1020 (1989) (finding state law violates party officials' rights to spread political message to voters seeking to inform themselves on campaign issues). As the Ninth Circuit noted, the Amendment could "hardly be more inclusive"; it "prohibit[s] the use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English." *Yniguez v. AOE*, 69 F.3d at 933.

¶52 Except for a few exceptions, the Amendment prohibits all elected officials from acting in a language other than English while carrying out governmental functions and policies. Several of the plaintiffs in this matter are elected state legislators, who enjoy the "widest latitude to express their views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 136, 87 S.Ct. 339, 349 (1966). Heretofore, when necessary in order to communicate effectively with their constituents, those legislators have spoken their constituents' primary language if those constituents do not speak English well, or at all.

¶53 Citizens of limited English proficiency, such as many of the named legislator's constituents, often face obstacles in petitioning their government for redress and in accessing the political system. Legislators and other elected officials attempting to serve limited-English-proficient constituents face a difficult task in helping provide those constituents with government services and in assisting those constituents in both understanding and accessing government. The Amendment makes the use of non-English communication to

accomplish that task illegal. In Arizona, English is not the primary language of many citizens. A substantial number of Arizona's
Native Americans, Spanish-speaking citizens, and other citizens for whom English is not a primary language, either do not speak English at all or do not speak English well enough to be able to express their political beliefs, opinions, or needs to their elected officials. Under the Amendment, with few exceptions, no elected official can speak with his or her constituents except in English, even though such a requirement renders the speaking useless. While certainly not dispositive, it is also worth noting that in everyday experience, even among persons fluent in English as a second language, it is often more effective to communicate complex ideas in a person's primary language because some words, such as idioms and colloquialisms, do not translate well, if at all. In many cases, though, it is clear that the Amendment jeopardizes or prevents meaningful communication between constituents and their elected representatives, and thus contravenes core principles and values undergirding the First Amendment.

¶54 AOE argues that the "First Amendment addresses [the] content not [the] mode of communication." The trial court adopted this argument, concluding that the Amendment was a permissible content-neutral prohibition of speech. Essentially, AOE argues that strict scrutiny should be reduced in this case because the decision to speak a non-English language does not implicate pure speech rights, but rather only affects the "mode of communication." By requiring that government officials communicate only in a language which is incomprehensible to non-English speaking persons, the Amendment effectively bars communication itself. Therefore, its effect cannot be characterized as merely a time, place, or

manner restriction because such restrictions, by definition, assume and require the availability of alternative means of communication. *E.g., Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746 (1989) (requiring the performance of a concert at a lower than desired volume); *see also Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118 (1984) (requiring the distribution rather than the posting of leaflets on public property).

¶55 AOE also argues that the Amendment can be characterized as a regulation that serves purposes unrelated to the content of expression and therefore should be deemed neutral, eve if it has an incidental effect on some speakers or messages but not others. *See Ward*, 491 U.S. at 791, 109 S.Ct. at 2754 (citing *City of Renton*, 475 U.S. at 47-48, 106 S.Ct. at 929-30). We agree with the Ninth Circuit's emphatic rejection in *Yniguez v. AOE* of the suggestion that the decision to speak in a language other than English does not implicate free speech concerns, but is instead akin to expressive conduct. There, the court said that "[s]peech in any language is still speech and the decision to speak in another language is a decision involving speech alone." 69 F.3d at 936. *See generally* Cecilia Wong, *Language is Speech: The Illegitimacy of Official English After* Yniguez v. Arizonans for Official English, 30 U.C. Davis L. Rev. 277, 278 (1996).

¶56 The United States Supreme Court has observed that "[c]omplete speech bans, unlike content-neutral restrictions on time, place or manner of expression, are particularly dangerous because they all but foreclose alternative means of disseminating certain information." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 506, 116 S.Ct. 1495, 1507 (1996) (internal citation omitted); *see also City of Ladue v.*

Gilleo, 512 U.S. 43, 55, 114 S.Ct. 2038, 2045 (1994) ("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression.").

¶57 The Amendment poses a more immediate threat to First Amendment values than does legislation that regulates conduct and only incidentally impinges upon speech. *Cf. United States v. O'Brien*, 391 U.S. 367, 375-76, 382, 88 S.Ct. 1673, 1678, 1681-82 (1968) (statute prohibiting knowing destruction or mutilation of selective service certificate did not abridge free speech on its face); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-94, 104 S.Ct. 3065, 3068-69 (1984) (National Park Service regulation forbidding sleeping in certain areas was defensible as a regulation of symbolic conduct or a time, place, or manner restriction). Laws "directed at speech" and communication are subject to exacting scrutiny and must be "justified by the substantial showing of need that the First Amendment requires." *Texas v. Johnson*, 491 U.S. 397, 406, 109 S.Ct. 2533, 2541 (1989) (citations omitted); *accord First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421 (1978); *Buckley v. Valeo*, 424 U.S. 1, 16-17, 96 S.Ct. 612, 633 (1976). Here, the drafters of the Amendment articulated the need for its enactment as promoting English as a common language. The Legislative Council's official argument in favor of the Amendment stated: "The State of Arizona is at a crossroads. It can move toward the fears and tensions of language rivalries and ethnic distrust, or it can reverse this trend and strengthen our common bond, the English language."

¶58 Even if the Amendment were characterized as a content- and viewpoint-neutral ban, and we hold such a characterization does not apply, the Amendment violates the

First Amendment because it broadly[11] infringes on protected speech. *See National Treasury Employees Union*, 513 U.S. at 470, 115 S.Ct. at 1015 (striking down content-neutral provisions of Ethics Reform Act due to significant burdens on public employee speech and on the "public's right to read and hear what Government employees would otherwise have written and said"). In *National Treasury Employees Union*, the Court recognized that a ban on speech *ex ante* (such as that imposed by the Amendment) constitutes a "wholesale deterrent to a broad category of expression by a massive number of potential speakers" and thus "chills potential speech before it happens." *Id.* at 467-68, 115 S.Ct. at 1013-14 (footnote omitted) (citation omitted); *see also City of Ladue*, 512 U.S. at 55, 114 S.Ct. at 2045 (holding that even content- and viewpoint-neutral laws can "suppress too much speech"). *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S.Ct. 2568, 2572 (1987) (viewpoint neutral regulation held unconstitutional because it "prohibited *all* protected expression").

¶59 The chilling effect of the Amendment's broad applications is reinforced by Section 4 which provides that elected officials and state employees can be sued for violating the Amendment's prohibitions. *See* Appendix. We conclude that the Amendment violates the First Amendment.

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[11]We do not address the plaintiffs' separate overbreadth claim because we hold that the Amendment unconstitutionally infringes on First Amendment rights. Overbreadth should only be addressed where its effect might be salutary. *Massachusetts v. Oakes*, 491 U.S. 576, 581-82, 109 S.Ct. 2633, 2636-37 (1987); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916 (1973) (holding that applying overbreadth analysis constitutes manifestly strong medicine that is to be employed sparingly and only as a last resort).

V. Equal Protection

¶60 Section One of the Fourteenth Amendment provides, in pertinent part, that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The right to petition for redress of grievances is one of the fundamental rights guaranteed by the First Amendment. *United Mine Workers*, 389 U.S. at 222, 88 S.Ct. at 356 (right to petition for redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights). A corollary to the right to petition for redress of grievances is the right to participate equally in the political process. *See Reynolds*, 377 U.S. at 560, 556-68, 84 S.Ct. at 1380, 1379-85 (concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged); *accord Evans v. Romer*, 854 P.2d 1270, 1276 (Colo. 1993) ("the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and . . . any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny"); *see also Dunn v. Blumstein*, 405 U.S. 330, 335, 92 S.Ct. 995, 1000 (1972) (recognizing fundamental right to participate in state elections on an equal basis with other citizens in the jurisdiction).

¶61 The Amendment is subject to strict scrutiny because it impinges upon the fundamental First Amendment right to petition the government for redress of grievances. *United Mine Workers*, 389 U.S. at 222, 88 S.Ct. at 356. The right to petition bars state action interfering with access to the legislature, the executive branch and its various agencies, and the judicial branch. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-39, 81 S.Ct. 523, 529-31 (1961) (legislature); *United Mine Workers v.*

Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965) (executive); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972) (administrative agencies and courts); *United Mine Workers*, 389 U.S. at 221-22, 88 S.Ct. at 355-56 (courts).

¶62 The trial court rejected plaintiffs' equal protection argument on the grounds that plaintiffs had not shown that the Amendment was driven by discriminatory intent. *See Hunter v. Underwood*, 471 U.S. 222, 229, 105 S.Ct. 1916, 1921 (1985). Because the Amendment curtails First Amendment rights, however, it is presumed unconstitutional and must survive this court's strict scrutiny.[12] *See generally Rosen*, 641 F.2d at 1246. AOE and the state defendants bear the burden of establishing the Amendment's constitutionality by demonstrating that it is drawn with narrow specificity to meet a compelling state interest. *Id.*

¶63 Challenges to official English pepper history, but, except for its decision in *Yniguez* which was dismissed on standing, the United States Supreme Court has not addressed the constitutionality of official English statutes since the 1920s. In *Meyer*, 262 U.S. 390, 43 S.Ct. 625,[13] the Court

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[12]Because strict scrutiny analysis applies to the governmental regulation of speech imposed by the Amendment, we do not address whether a language minority constitutes a suspect class for equal protection purposes. *See San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973) (describing the criteria characterizing suspect classification for equal protection purposes).

[13]We recognize that in *Yniguez v. AOE* the Ninth Circuit relied upon *Meyer* in concluding that the Amendment violated the First Amendment. 69 F.3d at 945-48 (citing *Meyer*, 262 U.S. at 403, 43 S.Ct. at 626). We note, however, that *Meyer* was decided two years before the Court applied the First Amendment to the states through the Fourteenth Amendment. *Gitlow*, 268 U.S. 652, 45 S.Ct. 625. While we hold that

reviewed a statute forbidding any teacher to "teach any subject to any person in any language other than the English language." The Court held that teachers have the constitutional right to teach, and students have the equivalent right to receive, foreign language instruction. *Id.* at 400-03, 43 S.Ct. at 627-28. In so doing, the Court noted:

> [T]he individual has certain fundamental rights which must be respected. *The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.* Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution - a desirable end cannot be promoted by prohibited means.

Id. at 401, 43 S.Ct. at 627 (emphasis added).

¶64 In *Meyer*, the Court held that the statute violated Fourteenth Amendment due process and equal protection rights. Specifically, the Court held that the Nebraska statute, by forbidding foreign language instruction, was arbitrary and did not reasonably relate to any end within the competency of the state to regulate. *Id.* at 403, 43 S.Ct. at 628. The Court acknowledged that a state has legitimate interests in promoting the civic development of its citizens and that a uniform language might aid this promotion. *Id.* at 401, 43

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the Amendment violates the First Amendment, we rely on the decisions previously discussed and we do not reach the issue of whether *Meyer* offers speech any particular protection under the First Amendment. *See* Howard O. Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930*, 35 Emory L.J. 59, 117, 128 (1986) (stating that *Meyer* does not offer speech any particular protection).

S.Ct. at 627. The Court held, however, that the statute abrogated the fundamental, individual right of choice of language. *Id.* at 403, 43 S.Ct. at 628. Despite its desirable goals, the Nebraska statute was held to employ prohibited means exceeding the state's power. *Id.* at 402, 43 S.Ct. at 628. The discriminatory Nebraska law, as applied, thus deprived both teachers and students of their liberty without due process of law. *Id.* at 400-02, 43 S.Ct. at 627-28. We believe the Amendment suffers from the same constitutional infirmity.

¶65 As discussed previously, the compelling state interest test applies to the Amendment because it affects fundamental First Amendment rights. Even assuming *arguendo* that AOE and the state defendants could establish a compelling state interest for the Amendment (and they have not met that burden), they cannot satisfy the narrow specificity requirement. Under certain very restricted circumstances, states may *regulate* speech. *See e.g., Kovacs v. Cooper*, 336 U.S. 77, 80, 69 S.Ct. 448, 450 (1949) (the First Amendment permits regulation of the time, place, and manner of the use of sound trucks). However, the Amendment is not a "regulation." Rather, it is a *general prohibition* of the use of non-English languages by all state personnel during the performance of government business and by all persons seeking to interact with all levels of government in Arizona. The Amendment's goal to promote English as a common language does not require a general prohibition on non-English usage. English can be promoted without prohibiting the use of other languages by state and local governments. Therefore, the Amendment does not meet the compelling state interest test and thus does not survive First Amendment strict scrutiny analysis.

¶66 Finally, we note that any interference with First

Amendment rights need not be an absolute bar to render it unconstitutional as violating equal protection; a substantial burden upon that right is sufficient to warrant constitutional protections. By permanently implementing a linguistic barrier between persons and the government they have a right to petition, the Amendment substantially burdens First Amendment rights. *See Eastern R.R. Presidents Conference*, 365 U.S. at 137, 81 S.Ct. at 529 ("The whole concept of representation depends upon the ability of the people to make their wishes known to their representatives"). Therefore, the Amendment violates the Fourteenth Amendment's guarantees of equal protection because it impinges upon both the fundamental right to participate equally in the political process and the right to petition the government for redress.

VII. Severability

¶67 In an effort to salvage the Amendment, the Attorney General urges us to hold that only Sections 1(2) and 3(1)(a) are unconstitutional and to sever the remaining portions. In Arizona, an entire statute (in this case, a constitutional provision) need not be declared unconstitutional if constitutional portions can be separated. *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 151, 800 P.2d 1251, 1259 (1990). However, the valid portion of the statute will be severed only if it can be determined from the language that the voters would have enacted the valid portion absent the invalid portion. *State Compensation Fund v. Symington*, 174 Ariz. 188, 195, 848 P.2d 273, 280 (1993). We hold that the Amendment is not capable of such judicial surgery, and we decline to sever the invalid portions of the Amendment. We do so, first, because the Amendment does not contain a severability clause and, second, because the record is devoid of evidence that the voters would have enacted such a

rewritten and essentially meaningless amendment. *See Campana v. Arizona State Land Dep't*, 176 Ariz. 288, 294, 860 P.2d 1341, 1347 (1993) ("A statute or provision is severable if the valid and invalid portions are not so intimately connected as to raise the presumption that the legislature would not have enacted the one without the other and if the invalid portion was not the inducement for the passage of the entire act") (citations omitted).

¶68 It is not possible to sanitize the amendment in order to narrow it sufficiently to support its constitutionality. We have not way of knowing, aside from mere speculation, whether the people would have passed the two sections that declare English as the official language and require that all acts of government be conducted in English. Moreover, even if those two provisions alone had been passed, it would be an unjustified stretch to insert the word "official" before the word "act" as the Attorney General now proposes. Therefore, we hold that the Amendment does not lend itself to severability.

CONCLUSION

¶69 The Attorney General's attempt to narrow the construction and application of the Amendment is irreconcilable with both the Amendment's plain language and its legislative history. Thus, that construction cannot be used to obviate the Amendment's unconstitutionality or to cure its overbreadth. The Amendment is not content-neutral; rather, it constitutes a sweeping injunction against speech in any language other than English. The Amendment unconstitutionally infringes upon multiple First Amendment interests - those of the public, of public employees, and of elected officials.

¶70 The Amendment adversely affects non-English

speaking persons and impinges on their ability to seek and obtain information and services from government. Because the Amendment chills First Amendment rights that government is not otherwise entitled to proscribe, it violates the Equal Protection Clause of the Fourteenth Amendment. The Amendment's constitutional infirmity cannot be salvaged by invoking the doctrine of severability.

¶71 We expressly note that we do not undertake to define the constitutional parameters of officially *promoting* English, as distinguished from banning non-English speech. Our holding does not question or denigrate efforts to encourage English as a common language; but such efforts must not run afoul of constitutional requirements and individual liberties. Nor is the constitutionality of a less comprehensive English-only provision before us.

¶72 Significantly, in finding the Amendment unconstitutional, we do not hold, or even suggest, that any governmental entity in Arizona has a constitutional obligation to provide services in languages other than English, except, of course, to the extent required by federal law.

¶73 The opinion of the court of appeals is vacated and the trial court's judgment is reversed. This matter is remanded with directions to enter judgment in accordance with this opinion.

James Moeller, Justice

CONCURRING:
Thomas A. Zlaket, Chief Justice
Charles E. Jones, Vice Chief Justice
Stanley G. Feldman, Justice

MARTONE, Justice, specially concurring.

¶74 A word of caution is in order. The posture of this case is unusual. The plaintiffs here have never faced actual or threatened injury because the defendants take the position that the English Only Amendment is narrow and applies only to official acts. Not content with this narrowing construction, the plaintiffs have taken the position that the Amendment is not limited to official acts and is broad enough to include even legislator-constituent communications. The defendants, however, do not raise a standing or case or controversy defense, and we are left to wonder about its proper resolution.

¶75 There is yet a second layer of potential case or controversy question in this case. The defendants concede that if the Amendment is interpreted as broadly as suggested by plaintiffs, then it is unconstitutional. And yet the plaintiffs take the position that if the Amendment is as narrow as the defendants say it is (i.e., applies only to official acts), then it is not unconstitutional. This leaves us with plaintiffs arguing that it is unconstitutional because of its breadth, but no one arguing that it is constitutional notwithstanding its breadth. We thus have no adversariness in connection with the ultimate federal constitutional question. *Cf.* U.S. Const. art. III, § 2 (requiring the existence of a "case" or "controversy" for federal adjudication); *see, e.g., Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1067-69, 1075 (1997) (remanding case for dismissal for lack of case or controversy). To illustrate, the en banc opinion of the United States Court of Appeals for the Ninth Circuit in *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), was decided by a 6-5 vote, but the contentions of the five dissenting judges in the court of appeals have not been made

in this court because the defendants agree with the plaintiffs that if the Amendment is broadly construed, it is unconstitutional.

¶76 It is likely, therefore, that were we an Article III court, we would have had to dismiss this case for lack of case or controversy. We are not unaware of a disquieting paradox: because of the lack of adversity, there is a greater risk of error -- yet that same lack of adversity diminishes the likelihood of further judicial review.

Frederick J. Martone, Justice

APPENDIX

Article XXVIII of the Arizona Constitution provides as follows:

ARTICLE XXVIII. ENGLISH AS THE OFFICIAL LANGUAGE

§ 1. English as the official language; applicability

Sec. 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3) (a) This Article applies to:

(i) the legislative, executive and judicial branches of government.

(ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities.

(iii) all statutes, ordinances, rules, orders, programs and policies.

(iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase, "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

§ 2. Requiring this state to preserve, protect and enhance English

Sec. 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.

§ 3. Prohibiting this state from using or requiring the

use of languages other than English; exceptions

Sec. 3. (1) Except as provided in Subsection (2):

(a) this State and all political subdivisions of this State shall act in English and in no other language.

(b) no entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) no governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

(c) to teach a student a foreign language as part of a required or voluntary educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

§ 4. Enforcement; standing

Sec. 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARMANDO RUIZ, LINDA AGUIRRE, JOHN PHILIP EVANS, ROSIE GARCIA, CANDIDO MERCADO, MANUEL PENA, JR., PETER RIOS, MACARIO SALDATE IV, FEDERICO SANCHEZ and VICTOR SOLTERO,
Plaintiffs-Appellants-Cross-Appellees,

v.

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,
Intervenors, Defendants-Appellees-Cross-Appellants.

1 CA-CV 94-0235
DEPARTMENT A
O P I N I O N
Appeal from the Superior Court of Maricopa County
Cause No. CV 92-19603
The Honorable Jeffrey S. Cates

AFFIRMED IN PART; REVERSED IN PART

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WEISBERG, Judge

Plaintiffs appeal the trial court's grant of summary judgment in favor of Defendants State of Arizona, Fife Symington III, Governor of Arizona, Grant Woods, Attorney General of Arizona, and Intervenors Arizonans for Official English and Robert D. Park (AOE). Intervenors cross-appeal the trial court's denial of their motion for attorneys' fees. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL HISTORY

In November 1988, Arizona enacted, by voter initiative, Article XXVIII (Article 28) of the Arizona Constitution:

ARTICLE XXVIII.
ENGLISH AS THE OFFICIAL LANGUAGE

1. *English as the Official Language; Applicability.*

Section 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3) (a) This Article applies to:

(i) the legislative, executive and judicial branches of the government,

(ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,

(iii) all statutes, ordinances, rules, orders, programs and polities,

(iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this section, as appropriate to the circumstances.

2. *Requiring This State to Preserve, Protect and Enhance English.*

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.

3. *Prohibiting This State from Using or Requiring the Use of Languages Other Than English; Exceptions.*

Section 3. (1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and in no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language; to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.
(b) to comply with other federal laws.
(c) to teach a student a foreign language as part of a required or voluntary educational curriculum.
(d) to protect public health or safety.
(e) to protect the rights of criminal defendants or victims of crime.
4. *Enforcement; Standing.*
Section 4. A person who resides in or does business in this State shall have standing ro bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

In November 1988, Maria Yniguez, a bilingual state employee who communicated in both English and Spanish while at work, filed an action in federal district court against the State, Governor, and Attorney general of Arizona. She sought an injunction against the enforcement of Article 28 and a declaration that it violated the First and Fourteenth Amendments of the United States Constitution and federal civil rights laws.

In January 1989, Bob Corbin, the Arizona Attorney General at that time, issued his interpretation of Article 28. He concluded that the text of Article 28 did not require a broad ban on any non-English language because the use of other languages would not be prohibited in rendering government services. Instead, he reasoned, Article 28 required only that, as the official language of Arizona, English be used to conduct the official acts of the government.

Op.Atty. Gen.AZ. No. I89-009 (1989).

In *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990), the district court disagreed with the attorney general and interpreted Article 28 to forbid all government officers and employees from using any language other than English in the course of their government duties with the exception of the limited areas set out in section 3(2). So interpreted, the district court found that Article 28 was facially overbroad and violated the First Amendment. The injunction, however, was denied since there was no enforcement action pending against Yniguez.

The state defendants were satisfied with the judgment and chose not to appeal to the Ninth Circuit. AOE, however, the principal sponsors of the initiative to enact Article 28, intervened as defendants so they could pursue the appeal. The Attorney General was also allowed to intervene for the limited purpose of arguing for his interpretation of Article 28 or, alternatively, for the certification of the interpretation of Article 28 to the Arizona Supreme Court pursuant to Ariz. Rev. Stat. Ann. ("A.R.S.") section 12-1861. Arizonans Against Constitutional Tampering (AACT), the principal opponents of the ballot initiative, were allowed to intervene as plaintiffs.

In *Yniquez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), the Ninth Circuit refused to certify the question to the Arizona Supreme Court, and agreed with the district court that Article 28 was facially overbroad. Shortly after the ninth Circuit issued its opinion, AOE filed a petition for a writ of certiorari in the United States Supreme Court, which was granted. 116 S. Ct. 1316 (Mar. 26, 1996).

In November 1992, the ten plaintiffs in the instant case brought an action on superior court against the

Governor and Attorney General of Arizona.[1] They sought a declaratory judgment that Article 28 violates the First, Ninth, and Fourteenth Amendments to the United States Constitution. The plaintiffs are four state elected officials, five state employees, and one private citizen. They are all bilingual and regularly communicate in both Spanish and English as private citizens and during the performance of government business. At least four of the plaintiffs are members of AACT, including Armando Ruiz, who is the chair of that group. AOE intervened as a defendant shortly after the complaint was filed and thereafter was the primary defending litigant.

AOE moved for summary judgment. Plaintiffs responded and filed a cross-motion. The trial court granted AOE's motion, finding that Article 28:

1. is a content-neutral regulation that does not violate the First Amendment,
2. does not violate the Equal Protection Clause of the Fourteenth Amendment because there is no proof of discriminatory intent, and
3. does not violate the Ninth Amendment because such does not protect choice of language.

AOE moved for an award of attorneys' fees pursuant to A.R.S. section 12-2030. The court denied the motion finding that section 12-2030 did not apply since AOE had not brought the action, and it was not in the nature of a petition for writ of mandamus.

Plaintiffs now appeal arguing that Article 28 should be interpreted as a blanket prohibition against all government

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[1]Plaintiffs later added the State of Arizona as a defendant in their first amended complaint.

employees using any language other than English in the performance of any government business. As such, they reason, Article 28 is a content-based regulation of speech that is contrary to the First Amendment. Plaintiffs also argue that Article 28 constitutes intentional discrimination against non-English speaking minorities and violates the Equal Protection Clause of the Fourteenth Amendment.

AOE answers that Article 28 should be narrowly construed as requiring the use of English only for official, binding government acts. So construed, they argue, Article 28 does not violate either the First or Fourteenth Amendments. AOE also cross-appeals the denial of their attorneys' fees.

Being mindful of the *Yniquez* litigation, this court requested additional briefing from the parties on the issues of collateral estoppel and comity.

DISCUSSION

Judicial comity is an equitable principle, not a rule of law, in which courts of one state or jurisdiction give effect to the "judicial decisions of another, not as a matter of obligation[,] but out of deference and respect." *Bobala v. Bobala*, 33 N.E.2d 845, 848 (1940). "Comity between federal and state courts is necessary to prevent . . . unseemly conflicts of jurisdiction and to promote a decent and orderly administration of justice. [It] reflects sound public policy and should be applied in a spirit of liberality." 21 C.J.S. *Courts* § 210 (1990).

Both comity and federalism concerns underlie the various federal doctrines that have developed regarding abstention, *see e.g.*, *Webb v. Webb*, 451 U.S. 493, 499-500 (1981); *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 477 (1977), and the less cumbersome alternative of

certification, *see Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 396 (1988); *Bellotti v. Baird*, 428 U.S. 132, 146-48 (1976). In *Yniquez*, the Ninth Circuit refused to abstain and certify the question of Article 28's proper interpretation to the Arizona Supreme Court, although the issue was pending in our state court system. The court found that abstention was inappropriate because the case involved a First Amendment challenge and because Article 28 was not obviously susceptible to a limiting construction. 69 f.3d at 930-31; *cf. Brocket v. Spokane Arcades, Inc.*, 472 U.S. 491, 507-10 (1985) (O'Connor, J. concurring); *Almodovar v. Reiner*, 832 F.2d 1138, 1140 (9th Cir. 1987).

This court is now placed in the difficult position of deciding whether to reach the merits of this case or whether to defer to the pending federal adjudication. Comity, in the context of federal-state relations, more typically applies when a federal court finds that deference to a state court, on an issue of state law, is proper. States, however, should also defer, when appropriate, to federal courts. In *Bouwman v. Dept of Social Servs.*, 375 N.W.2d 806, 808 (Mich. App. 1985), a state court held that principles of comity required it to defer to a federal court decision concerning the interpretation and constitutionality of a state social services regulation. *See also Hall v. Nomura Sec. It'l*, 268 Cal. Rptr. 45, 49 (App. 1990) (while lower federal court decisions are not binding, they are entitled to great weight); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990) (judicial comity affording deference to federal court decisions ensures uniformity of law and discourages forum shopping); *Van de Hay v. United States Nat'l Bank*, 793 P.2d 1388, 1390 (App. 1990) (noting the "practical advantages" of adopting the same statutory interpretation as a federal court), *aff'd on other grounds*, 829 P.2d 695 (Or. 1992).

In these circumstances, we conclude that it is appropriate for us to exercise our discretion and defer to the federal litigation and thereby accept the construction of Article 28 and the analysis that was set forth by the Ninth Circuit. Such deference promotes uniformity in interpretation of the law and discourages the parties from forum shopping. Further, the United States Supreme Court may choose to address the constitutionality of Article 28 and put both *Yniquez* and the instant case to rest.

We affirm the trial court's denial of AOE's attorneys' fees.

CONCLUSION

We exercise our discretion and accept the opinion of the Ninth Circuit. The judgment of the trial court is reversed as to Article 28 and affirmed as to the denial of AOE's attorneys' fees.

Sheldon H. Weisberg, Presiding Judge

CONCURRING:
Philip E. Toci, Judge
William F. Garbarino, Judge

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY
January 24, 1994
HON. JEFFREY S. CATES

Clerk of the Court — N. Devereux, Deputy
Nº CV 92-19603

ARMANDO RUIZ, et. al. — Stephen G. Montoya
v.

STATE OF ARIZONA, et al. — Attorney General
by: Thomas I. McClory

James F. Henderson

Plaintiffs challenge the constitutionality of Article XXVIII to the Arizona Constitution alleging that Article XXVIII: violates Plaintiffs' freedom of speech under the First Amendment to the United States Constitution; is facially overbroad; violates the Equal Protection Clause to the United States Constitution; and violates Plaintiffs' rights under the Ninth Amendment to the United States Constitution.

I. FREEDOM OF SPEECH:

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment prohibits the government from

proscribing speech or expressive conduct due to disapproval of the ideas expressed. *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d (1972). Content-based regulation of expression, however, has been upheld in some instances. *See F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978); *Layman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974).

A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). This Court concludes that Article XXVIII is content-neutral, and therefore does not violate the First Amendment to the Unites States Constitution.

II. FACIALLY OVERBROAD:

A law is not facially overbroad unless it reaches constitutionally protected conduct. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). Based on this court's ruling above that Article XXVIII does not violate constitutionally protected free speech rights, this court concludes that Article XXVIII cannot be facially overbroad as it does not reach constitutionally protected conduct.

III. EQUAL PROTECTION:

Plaintiffs argue that Article XXVIII violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it discriminates against all Hispanics and other ethnic minorities, such as Asians and indigenous peoples.

In order to show a violation of the Equal Protection Clause, there must be proof of a racially discriminatory intent or purpose. *Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985) (citation omitted). There is nothing in the record to show such an intent or purpose. This court therefore concludes that Article XXVIII does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

IV. NINTH AMENDMENT:

Plaintiffs further argue that the right of a constituent to communicate with his/her elected official in the language of choice is protected by the Ninth Amendment to the United States Constitution.

The rights protected by the Ninth Amendment are those that are fundamental; rights not specifically enumerated but encompassed within the penumbra of the enumerated rights, and have been classified as matters relating to marriage, procreation, contraception, family relationships and child rearing. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976); *United States v. Choate*, F.2d 1965 (9th Cir. 1978). This Court concludes that the right to communicate in the language of choice does not fall within the rights protected by the Ninth Amendment.

Based on the foregoing,

IT IS ORDERED granting the Motion for Summary Judgment of Intervenors-Defendants Arizonans for Official English Committee and Robert D. Park.

FURTHER ORDERED denying Plaintiffs' Cross-Motion for Summary Judgment.

HON. JEFFREY S. CATES